TRANSLATION

OF

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ANGRE'S WADI, GIRGAUM.

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THE VYAVAHĀRAMAYŪKHA

OF

NĪLAKAṆṬHA

TRANSLATED INTO ENGLISH

with explanatory Notes and references to decided cases

BY

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PREFACE

The Vyavahāramayūkha of Nīlakaṇṭha is a work of paramount authority on Hind Law in Gujerat, the town and island of Bombay and in northern Konkan. Even where, as in the Maratha country and in the District of Ratnagiri, the Mitā ṣarā is the paramount authority, it occupies a very important, though a subor .nate. place. The first English translation of the Vyavahāramayūkha was pul .ished in 1827 by Borradaile. Considering the state of Sanskrit scholarsh'p among Westerners more than a hundred years ago the translation was a creditable performance. But, as has been judicially noticed, Borradaile's translation is in many places infelicitous[1], obscure[2] or positively wrong[3]. Besides, Borradaile's method of dividing the translation into chapters, sections and placita, though convenient to judges and lawyers for purposes of reference, conveyed to those unacquainted with the Sanskrit language or the original work the wrong impression that the original was similarly divided. About fifty years ago the late Rao Saheb V. N. Mandlik brought out a scholarly translation of the Vyavahāramayūkha, that was a great improvement on Borradaile's work, both in the accuracy of the translation and the method of its presentation. That work is not now available in the market. It omitted the section on ordeals, it did not refer to decided cases and was also inaccurate in some places, as a reference to the pages indicated in the Index to this translation will show. In 1924 Mr. J. R. Gharpure of Bombay, the indefatigable editor of the 'Collection of Hindu Law Texts' brought out a translation of the Vyavahāramayūkha. In this translation he generally follows the late Rao Saheb V. N. Mandlik, though here and there improvements are made; but he does not translate the section of the work on ordeals, nor does he cite even a considerable body of decisions of the High Courts that have a direct bearing on the text of the Vyavahāramayūkha.

In the translation here presented, the whole of the Vyavahāramayūkha has been rendered into English. The text chosen for translation is that contained in the edition of the Vyavahāramayūkha published by the Bhandarkar Oriental Research Institute at Poona in 1926. The pages of the text have been indicated at the bottom of the pages of the translation. In this translation, explanatory notes have been added in order to elucidate the meaning of the author. References to the pages of the notes in the Poona edition where the Vyavahāramayūkha has been exhaustively annotated have also been given in appropriate places for those who want to make a deeper study of the original and the translation. The Vyavahāramayūkha is written in continuous prose, except where quotations in verse (which are numerous) are cited from

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1. Vide 2 Bom. 388 at p. 421.
2. Vide 14 Bom. 612 at p. 617, 17 Bom. 759 at p. 762.
3. Vide *Sitabai* v. *Vasantrao* 3 Bom. L. R. 201 at pp. 205-6.

ancient works and sages. In the present translation quotations in verse have been clearly indicated by the method of beginning them in a separate line and by lessening the size of the lines of the translation of verses by a few letter spaces as compared with the rest of the work. Another feature of this translation is that exhaustive citations of decided cases have been made, wherein the Mayūkha has either been quoted, explained, criticised, referred to or which have an important bearing on the law as laid down in the Vyavahāramayūkha. The decisions of courts have in a few places been also criticized. It has, however to be borne in mind that this work does *not profess* to be a *treatise on Hindu Law* and that, therefore, no one should expect that all possible cases on Hindu Law would be found digested herein.

As judges and the legal profession have been accustomed for decades to use the translations by Borradaile and Mandlik and as decided cases cite quotations from and give references to these translations, in the corner of each page of this translation corresponding portions of Borradaile's translation contained in Stokes' collection of Hindu Law-books and Mandlik's translation have been indicated with the letters S and M respectively.

The Introduction to the edition of the text of the Vyavahāramayūkha deals exhaustively with the family and personal history of Nīlakaṇṭha, the works of Nīlakaṇṭha, the period of his literary activity, the contents of his twelve Mayūkhas which together constitute his digest called Bhagavantabhāskara, his position in Dharmaśāstra Literature and the position of the Vyavahāramayūkha in modern Hindu Law. Those who want to make a detailed study of these matters must refer to that Introduction. But for the benefit of those who do not know Sanskrit a brief treatment of the matters detailed above is given here.

An exhaustive synopsis of contents, an index of cases and Law Reports and a general index which also contains in italics important Sanskrit words will, it is hoped, add to the usefulness of this edition of the translation of the Vyvahāramayūkha.

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S. G. Patwardhan.

TABLE OF CONTENTS

INTRODUCTION

Information about the family of Nīlakaṇṭha can be gleaned from several sources. S'aṅkarabhaṭṭa, the father of Nīlakaṇṭha, wrote an account of the family called Gādhivaṁs'ānucarita. This work was so called because the *gotra* of the family was Vis'vāmitra. The work was brought to the notice of scholars by the late Mahāmahopādhyāya Haraprasād S'āstri (vide Indian Antiquary, vol. 41 pp. 7–13). Pandit Kāntanāthabhaṭṭa published at Mirzapur in 1903 a poem called ' Bhaṭṭavaṁs'akāvyam ' in ten *sargas* (cantos) and 409 verses, in which he gives a detailed history of the family to which both he and Nīlakaṇṭha belonged. Besides, the numerous works composed by the members of this family during the period of several centuries furnish considerable material for constructing a brief but reliable history of the family.

The home of the family was at Paithan in the Deccan on the Godāvarī. The *gotra* of the family was Vis'vāmitra or Gādhi. The most ancient ancestor named is Nāgapās'a or Nāganātha, whose son was Cāṅgadeva, whose son was Govinda. The real history of the family begins with Rāmes'varabhaṭṭa, son of Govinda. Rāmes'varabhaṭṭa was a very learned man, had numerous pupils, cured of leprosy the son of an influential Mahomedan officer of the Ahmednagar kingdom and travelled extensively. When on a pilgrimage to Dvārakā his first son Nārāyaṇabhaṭṭa was born to him in *s'ake* 1435 (1513 A.D.). Rāmes'varabhaṭṭa migrated eight years later to Benares. He had two more sons S'rīdhara and Mādhava. Rāmes'vara died at a very advanced age and his wife became a *satī*.

Nārāyaṇabhaṭṭa learnt all the s'āstras at the feet of his father. He vanquished Maithila and Gauḍa pandits at the house of Todarmal, the famous financier, scholar and statesman in the reign of Akbar. He was the most illustrious member of his family. He was very fond of copying and collecting Sanskrit manuscripts. He is said to have rebuilt the famous temple of Vis'ves'vara at Benares that had been razed to the ground by the Mussalmans. For his great learning and piety Nārāyaṇabhaṭṭa was given the title of ' Jagadguru ' and his family was given the first place of honour in the assembly of learned brāhmaṇas and at the recitation of the Vedas, which latter distinction, it is said, still continues in the family. Nārāyaṇabhaṭṭa wrote the Prayogaratna, Tristhalīsetu and several other works.

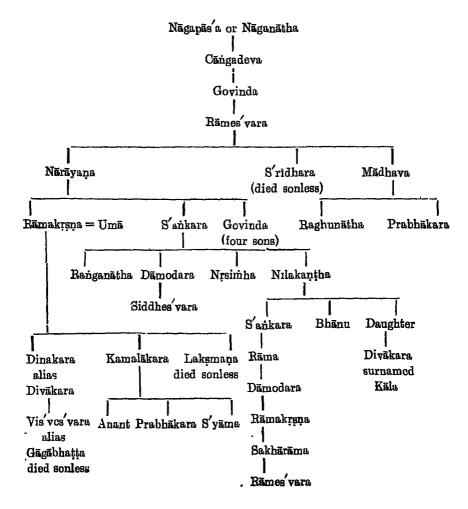
Nārāyaṇabhaṭṭa had three sons, Rāmakṛṣṇa, S'aṅkara and Govinda. Rāmakṛṣṇa was a very learned man and a great student of Mīmāṁsā. S'aṅkarabhaṭṭa was a profound mīmāṁsaka. He wrote a commentary on the S'āstradīpikā, a work called Dvaitanirṇaya, the Mīmāṁsābālaprakās'a, the Dharmaprakās'a and several other works.

Rāmakṛṣṇa had three sons, Dinakara alias Divākara, Kamalākara and Lakṣmaṇa. Dinakara wrote the Bhāṭṭadinakarī, the S'āntisāra, the Dinakaro-

ddyota. Kamalākara wrote no less than twenty-two works. The Nirṇayasindhu, one of his earliest works, was composed in 1612 A. D. Lakṣmaṇa wrote the Ācararatna, the Gotrapravararatna and other works.

As the colophon to the Vyavahāratattva of Nīlakaṇṭha shows, S'aṅkarabhaṭṭa had four sons Raṅganātha, Dāmodara, Nṛsiṁha and Nīlakaṇṭha, the last being the youngest.

Dinakara *alias* Divākara had a son called Vis'ves'varabhaṭṭa or Gāgābhaṭṭa. The latter officiated at the coronation of Shivaji, the founder of the Maratha Empire. He completed his father's digest called Uddyota and wrote the Bhāṭṭacintāmaṇi, the Kāyasthadharmadīpa, the S'ivārkodaya and several other works.

The pedigree of the family as far as Nīlakaṇṭha, his cousins and his immediate descendants are concerned is set forth in the accompanying table.

Dāmodarabhaṭṭa, the elder brother of Nīlakaṇṭha, had a son Siddhes'vara who composed a work called Saṁskāramayūkha in 1679-80 A. D. Nīlakaṇṭha had two sons, S'aṅkara and Bhānu. S'aṅkara had a hand in editing his father's Saṁskāramayūkha. He is also the author of Kuṇḍabhāskara, Vratārka and other works. Bhānubhaṭṭa also wrote several works. Nīlakaṇṭha's daughter's son Divākarabhaṭṭa Kāla (Kale in Marathi) was a very learned man and composed an extensive digest called Dharmas'āstrasudhānidhi. It is not necessary to pursue here the history of the family beyond this stage.

Nīlakaṇṭha composed an encyclopædia dealing with the various topics of *dharmas'āstra*. This work is generally styled *Bhagavanta-bhāskara* in honour of Nīlakaṇṭha's patron, Bhagavanta-deva or Bhagavantavarman, a Bundella chieftain of the Sengara (S'ṛṅgivara) clan, who ruled at Bhareha near the confluence of the Jumna and Chambal. As the whole work was styled Bhāskara (the sun), the twelve parts of it bear the name Mayūkha (ray). In most of the Mayūkhas Nīlakaṇṭha expressly states that he composed the work at the command of Bhagavantadeva.

The order in which the twelve Mayūkhas were composed and the subjects of which they treat are as follows: (1) Saṁskāramayūkha (the description of the principal saṁskāras i. e. purificatory ceremonies such as garbhādhāna, jātakarma, nāmakaraṇa, upanayana, marriage etc. and matters ancillary thereto); (2) Ācāramayūkha (the daily duties from rising to going to bed such as brushing the teeth, bathing, worship, sandhyāvandana, japa, homa, the five daily yajñas, tarpaṇa, meals etc.); (3) Samayamayūkha (the *tithis* and their nomenalature, important festivals like Rāmanavamī, Navarātra, Mahās'ivarātra etc., offering of piṇḍa on amāvāsyā, eclipses, rites appropriate to each month from caitra, the intercalary month, actions prohibited in the Kali age); (4) S'rāddha-mayūkha (definition of s'rāddha, pārvaṇa and ekoddiṣṭa, proper time and place for s'rāddha, persons competent to offer s'rāddha, food allowed in s'rāddha, brāhmaṇas unfit to be invited at s'rāddha etc.); (5) Nitimayūkha (king, coronation, king's duties, seven constituent elements of a state, envoys, etc.); (6) Vyavahāramayūkha (procedure and eighteen titles of law); (7) Dānamayūkha (definition of *dāna*, kinds of gifts, sixteen great gifts, etc.); (8) Utsarga-mayūkha (dedication of a reservoir of water, wells etc. to the public, the ritual thereof, planting of trees etc.); (9) Pratiṣṭhāmayūkha (consecration of temples and images, repairing old temples etc.); (10) Prāyas'cittamayūkha (definition of prāyas'citta, hells, different births to which sinners are condemned, various kinds of prāyas'cittas, visit to sacred places); (11) S'uddhimayūkha (purification of vessels of gold, silver, copper, clay etc.; periods of impurity on birth and death; practice of *satī* etc.); (12) S'āntimayūkha (definition of s'ānti, Vināyakas'ānti, graha-s'ānti, various propitiatory rites on the happening of portents or inauspicious things).

Nīlakaṇṭha also composed a work called Vyavahāratattva, which is an abridgment of the Vyavahāramayūkha. This work has been published as an

appendix to the edition of the Vyavāharamayūkha (Bhandarkar Oriental Institute, Poona). In that work he refers to the Vyavahāramayūkha as already composed by him. So that work is not a first rough draft or plan of the Vyavahāramayūkha, but is rather an epitome of his larger work for the benefit of beginners. He appears to have composed a separate work on adoption viz. Dattakanirṇaya.

Nīlakaṇṭha's literary activity must be placed in the first half of the 17th century. We saw above that his grand-father Nārāyaṇabhaṭṭa was born in 1513. His father S'aṅkara-bhaṭṭa quotes in his Dvaitanirṇaya the Ṭoḍarānanda which must have been composed between 1570 – 1586 (the year of the death of Todarmal). So the Dvaitanirṇaya was not composed much earlier than 1600. A. D. Kamalākara who was the paternal first cousin of Nīlakaṇṭha composed in 1612 A.D. his Nirṇayasindu which was one of his earliest works. One ms. of the Vyavahāratattva bears the date saṁvat 1700 (i.e. 1643–44 A.D.). S'aṅkara, the son of Nīlakaṇṭha, composed his Kuṇḍabhāskara in 1671 and Divākarabhaṭṭa, daughter's son of Nīlakaṇṭha, wrote his Ācārarka in 1686 A.D. Therefore Nīlakaṇṭha's literary activity lies between 1610 and 1650 A.D.

Nīlakaṇṭha occupies a prominent position among the mediaeval Sanskrit writers on dharmas'āstra. He frequently differs from Vijñānes'vara, the renowned author of the Mitākṣarā. These differences have been pointed out in the notes and in the Index. In the arrangement of the subjects of dharmas'āstra and in their treatment he was largely influenced by the Madanaratna. He frequently refers to other digests and encyclopædias like his own, viz. the Caturvargacintāmaṇi of Hemādri, the Vivādaratnākara of Caṇḍes'vara, the Nṛsiṁhaprasāda and the Ṭoḍarānanda. Nīlakaṇṭha expresses frank dissent even from the most eminent of his predecessors. He boldly criticizes even his father's views, though S'aṅkarabhaṭṭa was a profound Mīmāṁsaka. Nīlakaṇṭha was himself a profound student of the Mīmāṁsā system. In the vastness of the materials drawn upon, in ease and grace of style, in the brevity and lucidity of his remarks, in clearness of vision and in logical presentation of topics he is hardly surpassed by any mediaeval writer on dharmas'āstra.

A few words about the position of the Vyavahāramayūkha in modern Hindu Law may not be out of place here. It has been repeatedly said by the Privy Council and by the Bombay High Court that Manu, the Mitākṣarā and the Mayūkha are the books of chief authority in Western India.[1] In the Maratha country and in the Ratnagiri District, the Mitākṣarā is of paramount authority and a secondary place, though still a very prominent one,

1. *Pranjivandas* v. *Devkuvarbai* 1 Bom. H. C. R. (O. C. J.) 130 at p. 131; *Murarji* v. *Parvatibai* 1 Bom. 177 at p. 187; *Savitribai* v *Luxmibai* 2 Bom. 573 at p. 606; *Lallubhai* v. *Cassibai* 5 Bom. 110 at p. 117 (P. C.).

is assigned to the Vyavahāramayūkha.[1] The Vyavahāramayūkha is of paramount authority in Gujerat, the town and island of Bombay and in northern Konkan.[2] Though the pre-eminence of the Mitākṣarā in the Maratha country is acknowledged, yet in a few instances its doctrines have been either set aside or modified in favour of the views propounded by the Vyavahāramayūkha. For instance, though the Mitākṣarā nowhere expressly recognizes the sister as a *gotraja sapiṇḍa*, the courts, following the Mayūkha, have assigned to her a very high place as an heir even in the Maratha country and in Ratnagiri. It is a well-established rule of the Bombay High Court that where the Mitākṣarā is either silent or obscure the aid of the Vyavahāramayūkha must be invoked for its interpretation and the principle of interpretation is to harmonize both works wherever and so far as that is reasonably possible.[3] It is instructive to see how the Vyavahāramayūkha came to be recognised as the leading authority in Gujerat in matters of Hindu Law. It has been stated above that the family of Nilakaṇṭha came from Paithan in the Deccan. Naturally all the learned members of this family, though they wrote in Benares or elsewhere, preferred the usages of the Deccan and S'aṅkarabhaṭṭa, the father of Nilakaṇṭha, says in his Dvaitanirṇaya that he will abide by the views of Deccan writers. Therefore the works of the Bhaṭṭas of Benares were highly esteemed by the learned men of the Maratha Country. That the Mayūkhas of Nīlakaṇṭha were eagerly sought for even as far to the south as Belgaum in the times of the Peshwas is established by a letter of Naro Vinayak, Mamlatdar of Athni in the present Belgaum District, dated 28th June 1797[4], where reference is made to the copying of the six Mayūkhas on saṁskāra, ācāra, samaya, s'rāddha, nīti and vyavahāra and a request is made that the other six Mayūkhas might be sent for a copy being made. When the Marathas held sway over Gujerat in the 18th century, the works of Kamalākara (particularly the Nirṇayasindhu) and of Nilakaṇṭha were relied upon by the s'āstris at the court of the Maratha rulers of Gujerat[5]. Thus the Vyavahāramayūkha had come to be recognised as a work of paramount authority in Gujerat at the time of the advent of the British in the first decades of the 19th century. It appears that even in Northern India the Vyavahāramayūkha was referred to by the British

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1. Vide *Rakhmabai v. Radhabai* 5 Bom. H. C. R. (A. C. J.) 181 at p. 185; *Narayan* v. *Nana* 7 Bom. H. C. R. (A. C. J.) 153 at p. 169; *Krishnaji* v. *Pandurang* 12 Bom. H. C. R. 65, at pp. 67 — 68; *Jankibai* v. *Sundra* 14 Bom. 612 at p. 616 (a case from Ratnagiri.).

2. *Lallubhai* v *Mankuvarbai* 2 Bom. 388 at p. 418; *Jankibai* v. *Sundra* 14 Bom. 612 at pp. 623 — 624; *Vyas Chimanlal* v. *Vyas Ramchandra* 24 Bom. 367 (F. B.) at p. 373.

3. *Gojabai* v. *Shrimant Shahajirao* 17 Bom. 114 at 118; *Bai Kesserbai* v. *Hunsraj* 30 Bom. 431, 442 (P. C,); *Bhagwan* v. *Warubai* 32 Bom. 300 at p. 312.

4. Vide Introduction to the edition of the text of the Vyavahāramayūkha p. XLIII n 1 (Bhandarkar Institute) where the letter is set out in full.

5. Vide *Lallubhai* v. *Mankuvarbai* 2 Bom. 388, pp. 418 — 419 and *Bhagirthibai* v. *Kahnujirao* 11 Bom. 285 (F. B.) at pp. 294 — 295 for the reasons of the pre-eminent position of the Vyavahāramayūkha in Gujerat and in Bombay island.

courts as early as 1813 A. D.[1]

As the Vyavahāramayūkha is said to be of paramount authority in northern Konkan and as it considerably differs from the Mitākṣarā in matters of inheritance and succession, it is of great practical importance to settle with precision the exact limits in northern Konkan up to which the Mayūkha must be regarded as supreme. It has been decided that Karanja, an island opposite the Bombay harbour, is governed by the principles of the Mayūkha[2], that Mahad, the southernmost Taluka of the Kolaba District, is not under the paramount influence of the Mayūkha and that the predominance of the Mayūkha cannot either on principle or authority be taken further south than Chaul and Nagothna (in the northern part of the Kolaba District[3]).

Though the authority of the Vyavahāramayūkha is supreme in Gujerat, in the island of Bombay and in northern Konkan and high in the Maratha country, it is not to be supposed that the whole of it has either been accepted by the people or adopted by the courts. There are several matters such as the twelve kinds of sons, the fifteen kinds of slaves and the marriage of a person with girls belonging to lower castes than his own on which Nīlakaṇṭha dwells with as much learning and seriousness as any ancient writer, although those usages had become obsolete centuries before his day. Nīlakaṇṭha says that the paternal great-grand-father, the paternal uncle and the half-brother's son succeed together as heirs. But the courts have never recognised this rule nor has that view ever been made the foundation of a claim in a court of law[4]. Nīlakaṇṭha, following his father S'aṅkarabhaṭṭa, says that a daughter's son or a sister's son can be adopted even by a person belonging to the three twice-born classes. But the Bombay High Court, owing probably to misapprehension as to the correct meaning of a highly abstruse passage of the Mayūkha (pp. 112-113 of the present translation and notes thereon), holds that the Vyavahāramayūkha is opposed to the adoption by the regenerate classes of the daughter's son and sister's son.[5]

1. Vide *Bhagwansingh* v. *Bhagwan* 17 All. 294 at p. 314.
2. Vide *Sakharam* v. *Sitabai* 3 Bom. 353.
3. Vide *Narhar* v. *Bhau* 40 Bom. 621 (where the authorities are collected).
4. Vide *Rahi* v. *Govind* 1 Bom. 97 at p. 112 and *Lallubhai* v. *Mankuvarbai* 2 Bom. 388 at pp. 420 and 447.
5. Vide *Gopal* v. *Hanmanta* 3 Bom. 273 at p. 280, and *Vyas Chimanlal* v. *Vyas Ramchandra*, 24 Bom. 473 at p. 480.

ABBREVIATIONS.

Ait. br. = Aitareya-brāhmaṇa

Ap. Gṛ. S. = Āpastamba-gṛhya-sūtra

Ap. S'r. S. = Apastamba-s'rauta-sūtra

Baud. Dh. S. = Baudhāyana-dharmasūtra

B. I. = Bibliotheca Indica series

Bor. = Borradaile's translation of the Vyavahāramayūkha contained in Stokes' collection

Bṛ. = Bṛhaspati, translated by Dr. Jolly in Sacred Books of the East, vol. 33

B. S. Series = Bombay Sanskrit series

C. P. Code = Civil Procedure Code

Dh. S. = Dharmasūtra

D.M. = Dattakamīmāṁsā

Kāt. = Kātyāyana (text reconstructed by P. V. Kane with translation and notes)

Mit. = Mitākṣarā

Nar. = Nārada in S. B. E.

Nīl. = Nīlakaṇṭha

Par. M. = Parās'ara-Mādhavīya (Bombay Sanskrit Series)

Ṛg. = Ṛgveda

S. = Stokes' collection of Hindu Law Books

S. B. E. = Sacred Books of the East series

Sm. C. = Smṛti-candrikā

Tai. Ā. = Taittirīya Āraṇyaka

Tai. S. = Taittirīya Saṁhitā

Vāj. S. = Vājasaneyasaṁhitā

V. C. = Vivāda-cintāmaṇi

Vir. = Vīramitrodaya (Jivananda's edition)

V. M. = Vyavahāramayūkha (edited by P. V. Kane with notes in the Govt. Oriental Series, Bhandarkar Institute, Poona).

V. R. = Vivāda-ratnākara

Vy. Māt. = Vyavahāramātṛkā (edited by Sir Asutosh Mukerji)

Yāj. = Yājñavalkya-smṛti

INDEX OF CASES

IV.

SYNOPSIS OF TRANSLATION

ERRATA

N. B.— A few obvious misprints have not been given here.

18 *n*4 ***read*** ' paś́ustrı-bhū o ' ***for*** ' paś́ustriyo '

36 ll. 26–27 ***read*** ' that (for not pointing out of the faults earlier) ***for*** ' that for not pointing out the faults earlier '

58 lines 1 and 16 ***read*** 48 ***for*** 49

94 *n*2 ***read*** 2 Bom. 494 ***for*** 2 Bom. 404

97 *n*1 ***read*** ' *anuloma* ' ***for*** ' *pratiloma* '

175 l. 10 ***read*** ' since from another text ' ***for*** ' since another text '

183 *n* ***read*** ' p. 149 *n*1 ' ***for*** ' p. 749 *n*1 '

190 *n* ***read*** ' *Sundaram* v. *Ramsamia* '

212 *n*2 ***read*** ' Yāj. II 11. ' ***for*** ' Yāj. II. 42 '

THE

VYAVAHĀRAMAYŪKHA

Composed by

BHATTA NĪLAKANTHA

1 Having spoken of the ways of royal policy and fittingly bowed to the lotus-like feet of the refulgent (Sun), Nīlakaṇṭha composes a little (work) on the disposal (decision) of ***vyavahāra*** (judicial proceedings).

2 I contemplate my revered (father) S'aṅkara, the only leader among the best of Brāhmaṇas, who looked after the religious practices (of the people), who was endowed with happiness, who was the teacher of all in Kās'ī (Benares).

3 That highest Person, who appeared in two forms in this world for propounding two conflicting paths (systems), has here (now) accepted the non-difference of (the views of the two) Mīmāṁsakas, (being born) in one form as Bhaṭṭa S'aṅkara.

4 There are certain (doctrines) here which are accepted by some who lead (people) astray; I have discarded them as they are baseless. On account of this (discarding) there is no deficiency of treatment in this (work); worship does not become deficient by the absence of the flower of the sky.

V. 1. 'Having spoken.........policy'— This refers to the composition of the Nītimayūkha, which immediately preceded that of the Vyavahāramayūkha.

V. 2. This verse also applies to god S'aṅkara by means of *S'leṣa* (Paronomasia). The words द्विजराज, वृष, शिवान्वित are paronomastic. The verse (with S'aṅkara) means 'I contemplate (the god) S'aṅkara, who has the moon as the only thing (by way of decoration) on his head who is the lord of the Bull, who is accompanied by Pārvatī (called S'ivā), who is the inspirer of all in Kās'ī and who is an object of worship'. S'iva is the presiding deity of Benares.

V. 3. For detailed explanation of this verse, vide notes to V. M. pp. 1—3. The two Mīmāṁsakas are Prabhākara and Kumārila. Nīlakaṇṭha claims that his father explained away the differences between the views of Prabhākara and Kumārila. Mandlik's explanation that the first half of the verse refers to S'aṅkara and Kumārila and that the latter half says that S'aṅkarabhaṭṭa accepted the identity of the human soul with the divine essence propounded by Vyāsa is far-fetched and wrong. The doctrine of *advaita* was not propounded by *Mīmāṁsakas* properly so called and Vyāsa and his school are hardly ever designated *Mīmāsṁakas*.

V. 4. Khapuṣpa (sky—flower) is a symbol of what is absolutely non-existent. Vide notes to V. M. p. 3 for khapuṣpa.

Definition of Vyavahāra

Vyavahāra is an action or operation that facilitates the exposure of the wrong that is not known (at the time when the operation begins as belonging to one) and that pertains to one out of the several persons that have a dispute (about it); or it is an operation in which the plaintiff and the defendant are the agents, in which possession, witnesses and (other) means of proof are applicable (according to circumstances) and which helps the establishment (of truth) in the midst of conflicting alternatives. According to the ***Madanaratna***, in the case of a reply of confession[1] (to the claim of the plaintiff) the term ***vyavahāra*** is applied (only) in a secondary sense. The latter part[2] (of the above definition) serves the purpose of excluding (from the denotation of ***vyavahāra***) ***vāda***, ***vitaṇḍā*** and the like

Now (as to) the titles of Vyavahāra Now (as to) its divisions, Yājñavalkya says (2 5):

> If one, invaded by others in a way that is in conflict with the ***smṛtis*** and established usage, complains to the king, that becomes a subject of ***vyavahāra***

The *word 'ādharsitaḥ' means 'ill-treated, despised'.

Manu (8 4-7) speaks of eighteen divisions of the subjects of ***vyavahāra***

> Of them the first is (1) the non-payment of debts, (then) (2) deposit, (3) sale by one who is not the owner, (4) partnership, (5) resumption of gifts, (6) non-payment of wages, (7) breach of compacts or conventions, (8) rescission of purchase and sale, (9) dispute between master and herdsman, (10) rules about boundary disputes, (11-12) harshness of bodily injury and speech (i e assault and defamation), (13) theft, (14) violent offences, (15) adultery, (16) duties of husband and wife, (17) partition, (18) gambling and prize fighting These are the eighteen subjects here in the sphere of ***vyavahāra***

'Anapākarma' means 'not giving' 'Anusayaḥ' means 'repentance' (i e rescission) 'Dyūtam' means 'playing by means of inanimate objects' (like dice), (while) 'samāhvaya' means gaming by means of animate objects In this (above) passage adultery and harshness of speech and assault are separately

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1. 'Reply of confession' —When a plaintiff lodged his complaint, the defendant had to give a reply, which was of four kinds, viz a total denial (*mithyā*), a confession or admission of plaintiff's claim (*sampratipatti*) a plea of cause (i e accepting the whole or part of the plaintiff's averments and meeting them with a counter cause), a plea of *res judicata* (prāṅnyāya). When the defendant admits plaintiff's claim, there is no necessity to employ means of proof and to establish the truth by reasoning Hence the definition of *vyavahāra* 'in which the plaintiff ... alternatives' cannot primarily apply to such a proceeding

2. 'The latter part' i e the words 'in which possession ... alternatives'. For explanation of *vāda* and *vitaṇḍā*, vide notes to V M pp 4—5 These are technical terms in Nyāya. In both there are disputants but in *vāda* the *pramāṇas* are *pratyakṣa*, *anumāna* &c. and not possession &c, in *vitaṇḍā* (mere cavilling) there is no attempt to find out the truth, but there is simply a desire to ridicule and vanquish one's opponent.

* P. 2 (text)

mentioned (from *sāhasa*) according to the maxim of the cattle and the bull[1], though they are (mere) varieties of *sāhasa* according to the dictum of Bṛhaspati (p. 359 v. 1):

Sāhasa is of four kinds, viz. killing a man, robbery, intercourse with another's wife and harshness of two kinds.

The nature of these eighteen (divisions) will be explained later on.

Now the summary of the fundamentals[2] of vyavahāra (judicial procedure).

Bṛhaspati (p. 279 v. 18) says:

(The king) should construct a separate building in his fort, with water and trees near it, (and) on the eastern side of it he should prepare the court-room, facing the east and possessed of all the good characteristics (of a *sabhā*).

* The same (i. e. *sabhā*) is (styled) dharmādhikaraṇa (hall of justice), as the text of Kātyāyana says:

That place, where the sifting of truth and falsehood after deliberation in accordance with *dharmaśāstra* (the science of law) is authoritatively made is the *dharmādhikaraṇa* (the hall of justice).

Manu (8. 1--2) says:

The king desirous of investigating judicial proceedings should enter the *sabhā* (court), being well-mannered and wearing a dress and ornaments befitting good breeding, along with ministers well-versed in state policy and with brāhmaṇas, (and) should look into the causes of the litigants.

Yājñavalkya (2. 1) says:

The king, being free from anger and avarice, should investigate judicial proceedings along with learned brāhmaṇas in conformity with *dharma-śāstra*.

(The word) 'nṛpaḥ' (means) any one whatever (of any caste) having authority to protect the subjects and not merely a *kṣatriya* (a man of the warrior caste). Kātyāyana (says):

The king who looks into (the judicial proceedings) together with the judge, the councillors, the brāhmaṇas, the family priest and the *sabhyas* (assessors, respectable men) reaches heaven on account of (his having followed) *dharma* (the dictates of righteousness).

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1. 'The maxim of the cattle and the bull'—For detailed explanation *vide* notes to V. M. p. 6. When a man says 'let cattle be brought and bulls also', this mode of expression is employed to draw special attention to the intractability of bulls, though the latter are included in the generic term 'cattle'. So robbery and adultery are separately mentioned apart from *sāhasa* by Manu, though they are varieties of *sāhasa*, in order to draw special attention to these important heads of *vyavahāra*.

2. The word mātṛkā means 'fundamentals, basis'. Jīmūtavāhana's work dealing with general rules of procedure and the means of proof is styled Vyavahāramātṛkā.

* P. 3 (text)

In this passage (the word) 'brāhmaṇa' (means) one who is not appointed (as a member of the court to decide causes), while '*sabhyas*' (assessors) are those who are appointed (by the king to decide causes). And to the same effect it has been said (Nārada p. 36 v. 2):

One who knows *dharma*, whether appointed or not, must speak out (what the decision should be[1]).

Bṛhaspati (278. v. 12) declares the definition of (*prāḍvivāka*) a judge :—

He, who in a controversy asks questions and also cross-questions and who is the first to speak (to a litigant) in a sweet manner, is therefore known as *prāḍvivāka*.

* Vyāsa declares the definition of *amātya* (councillor):

The king should appoint as *amātya* a person of the regenerate classes, who knows all the *s'āstras*, who is not avaricious, who utters what is just, who is a brāhmaṇa, who is wise and to whom the office comes hereditarily.

In this passage the word 'dvija' (a man of the regenerate classes) is used again (even after the word *vipra*, a brāhmaṇa) for the purpose of including a *kṣatriya* or a *vais'ya* (for appointment as minister[2]) in the absence of a *brāhmaṇa*. To the same effect (is) Kātyāyana:

Where there is no learned brāhmaṇa, (the king) should appoint a *kṣatriya* or a *vais'ya* who is proficient in dharmas'āstra; (but he) should carefully exclude a *s'ūdra*.

And Yājñavalkya (2-2) says as regards *sabhyas* (members of the court):

The king should appoint as members of the sabhā (court of justice) those who are endowed with Vedic learning, who are learned in *dharma* (law), who speak the truth, who do equal (justice) to friend and foe.

As regards their number Bṛhaspati (p. 278 v. 11) says:

That sabhā (court), where are seated seven, five or even three *brāhmaṇas*, who are conversant with worldly affairs and who are learned in the Vedas and in *dharma* (law), resembles (in holiness) a *yajña* (sacrifice).

The same author (p. 279. v. 14) says:

The king should appoint as *gaṇaka* (accountant) and *lekhaka* (scribe) two persons, who are versed in the principles of grammar (*s'abda*) and lexicography (*abhidhāna*), who are proficient in reckoning (casting figures), who are pure and who are acquainted with various alphabets.

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1 On the words 'appointed' and 'sabhya' *vide* notes to V. M. pp. 10-11.

2 Bṛhaspati, as quoted in the Vyavahāramātṛkā of Jīmūtavāhana, says 'In a sacrifice is honoured Viṣṇu, while in *vyavahāra* the king (is honoured); there (in sacrifice) the sacrificer is the successful (party) and the animal (sacrificed) is the vanquished party (as in a litigation); the plaint and the reply are the clarified butter and the conclusion is (*havis*) the offering; the S'āstra (dharmas'āstra) is the Veda and the *sabhyas* are the sacrificial priests who receive *dakṣiṇā* (payment for acting as adjudicators).

* P. 4 (text)

'S'abda' means the science of words (i. e. grammar); 'abhidhāna' (means) a lexicon. Kātyāyana says:

There merchants should be appointed to listen (to the evidence) and to decide what is just.

Tatra' (means) 'in the court'. Bṛhaspati (p. 279. v. 15) says:

(The king) should appoint his own truthful man (servant) who will be subject to the control of the ***sabhyas*** for summoning and looking after the witnesses, the plaintiff and the defendant.

* This (officer) should be a ***s'ūdra***. To the same effect is Vyāsa:

The king should appoint as ***sādhyapāla*** a strongly built s'ūdra, who helps (in arriving at) the truth (by summoning witnesses &c.), who holds the post hereditarily and who acts under the orders of the ***sabhyas***.

Yājñavalkya (2.3) says:

A king who cannot, owing to pressure of (other) work, look into the causes (of litigants) should appoint (to administer justice) a brāhmaṇa learned in all ***dharma*** (law) along with ***sabhyas***.

Bṛhaspati (p. 278. vv. 6 and 8) declares the duties of the king and the presiding (judge):

The presiding (judge) is to declare (the decision), the king is to punish (to execute the punishment), the ***sabhyas*** to investigate the causes, the accountant is to count the money (or to cast figures) and the scribe is to write down the (legal) proceedings.

The same author (Bṛhaspati p. 279 v. 16) says:

The king should sit facing the east, the ***sabhyas*** facing the north, but the accountant should face the west and the scribe the south.

Yājñavalkya (2. 30) speaks of determining agencies other than the royal court:

In matters of judicial proceeding among men each preceding one (out of the following), viz. the (judges) appointed by the king, the ***pūgas***, the ***s'reṇis*** and the ***kulas***, is superior (in authority).

The words 'nṛpeṇādhikṛtāḥ' mean 'the prāḍvivāka and others.' 'Pūgāḥ[1]' (means) the 'assembly of men living in the same village, earning their living

1 For detailed explanation of *pūga*, *śreṇi* and *kula*, vide notes to V.M. pp. 12-14. *Pūga* was somewhat like a village *panchāyat*; s'reṇi was a guild of persons belonging to the same caste and pursuing the same calling, such as a guild of oilmen or weavers. 'Kula' means the kindred of the parties constituted into a court. Nārada (I. 7) also says that *kula*, *śreṇi*, *gaṇa*, the judge (appointed by the king) and the king were the sources of justice, each of superior authority to the preceding one and Bṛhaspati as quoted in the Vīramitrodaya (p. 40) says that *kula*, *śreṇi* and *gaṇa* may investigate all causes other than those of *sāhasa* (heinous wrongs in which an element of force is involved).

* P. 5 (text)

by various callings and belonging to different castes.' And 's'renis' are the opposite of 'pūgas'. 'Kulāni' (means) the assembly of castemen, relatives and blood relations. Bṛhaspati (p. 281 v. 25) also says:

For those who move about in the forest a court should be held in the forest, for soldiers in the army and for merchants in the caravans.

* 'Karaṇa' (means) *sabhā* (court). Kātyāyana mentions the (proper) time for investigating judicial proceedings:

The king, putting down his foes, should decide the causes conformably to the rules laid down in the *s'āstras* in the court and in the first half of the day. The three parts[1] of the day omitting the (first) eighth part of it are declared to be the best time for (investigating) judicial proceedings as laid down in the *s'āstra*.

'The eighth part' is half of the first watch (of the day); 'the three parts' are those that are subsequent to it and precede mid-day. And Saṁvarta declares the *tithis* (lunar days) that are to be omitted (for investigating judicial proceedings):

The wise should not look into judicial proceedings on these *tithis* viz. the 14th day (of the two halves of the month), the new moon, the full moon and the eighth.

Bṛhaspati (p. 280 v. 23) says:

Having occupied that (court) in the first half of the day along with the old, the councillors and dependents, he (the king) should investigate (judicial proceedings) and should listen to (the expositions of) *purāṇas*, *dharmas'āstra* and *arthas'āstra*.

' Tām ' (means) the *sabhā* (the court). 'Arthas'āstra'[2] (means) the science of politics. Nārada (p. 15. v. 39) declares (a rule of preference) in case of conflict between *dharmas'āstra* and *arthas'āstra*:

Where there is a conflict between dharmas'āstra and arthas'āstra, one should do what is laid down in the *dharmas'āstra* and discard the dictates of *arthas'āstra*.

But in case of conflict between two texts of *dharmas'āstra* Yājñavalkya (2. 21) says:

1. 'The three parts &c.'—the idea is that the day (of 12 hours) is to be divided into eight parts (of 1½ hours each) and the court was to be held after the first part (of 1½ hours) and before midday (i. e. roughly between 7-30 A. M. and noon).

2. 'Arthas'āstra'—Mandlik and Bor. translate this as 'moral laws', but this is wrong. The well-known work of Kauṭilya on politics and state administration is styled *arthaśāstra*.

* P. 6 (text)

In case of conflict between two smṛtis reasoning (or decision) based upon the practices (of the old) is of greater force (or authority[1]).

* Bṛhaspati blames him who does not take reasoning into consideration (but merely follows the letter of the texts):

The decision (of the case) should not be given by merely relying upon s'āstra, for in the case of a decision void of reasoning loss of ***dharma*** results.

Bṛhaspati (p. 287 vv. 28-31) says that the (king) should take into consideration the usages of the country and the like :

The ***dharmas*** (modes of right conduct or usages) of a country, caste or family that were introduced in by-gone times should be preserved intact (as they are), otherwise the subjects become agitated (they resent interference in their usages); people become disaffected and the forces (strength or army) and the treasury (of the king) become depleted. The maternal uncle's daughter is accepted in marriage by brāhmaṇas of the south; in ***madhyades'a***[2] (central India), (brāhmaṇas) become hired labourers and craftsmen and eat cow's flesh; eastern (brāhmaṇas) eat fish and their women are addicted to illicit intercourse; in the north women are addicted to drinking and can be touched by men even when in their monthly courses. On account of the acts (specified) these (in their respective countries) should not be liable to undergo ***prāyas'citta*** (penance) or to incur judicial punishment.

The word 'pūrve' means 'living in the east.' In some (works) the reading is 'sarve' (for 'pūrve'). 'Sarve' (means) brāhmaṇas and (men of) other (castes); 'damaḥ' means 'daṇḍaḥ' (legal punishment); some (writers) maintain that the mention in some smṛtis of prāyas'citta and the like in the case of these acts applies to countries not mentioned in this passage (of Bṛhaspati), while others who explain ('prāyas'cittadama') as the punish-

1. The Mit. explains that in case of conflict between two smṛtis texts ratiocination which assigns to each of them its proper place by looking upon one as containing the rule and the other as containing the exception (and such other methods of interpretation) is of superior force, being based upon the practice of the old (who pursue the rule laid down in one text and avoid the other). Nyāya means 'rule of interpretation'. The word 'nyāya' may also mean 'the decision'. In that case the meaning is that in case of conflict beween two smṛti texts, the rule of decision should be to find out what the usages of the people are and to decide accordingly. Vis'varūpa gives two other senses of this passage and reads 'smṛter virodhe'. This text of Yāj. contains a rule somewhat similar to the doctrine that equity rather than the bare letter of the law should be followed. In *Bhau* v *Sundrabai* Bombay Printed Judgments 1874 p. 250 at pp. 251 and 252 the texts of Yāj. II. 21 and Br. are referred to and the text of Yāj. is translated as 'usage is of force for their construction'. Vide also *Chunilal* v *Surajram*. 33 Bom. 433 at p. 439 (=11 Bom. L. R. 708) where it is said that Nīlakaṇṭha cites Yājñavalkya's text that where there is a conflict between two or more smṛtis that one should be accepted which is conformable to equity.

2. Madhyades'a is the tract between the Himālaya and the Vindhya, to the east of the place where the Sarasvatī disappears and west of Prayāga (Allahabad). Vide Manu. I. 21.

* P. 7 (text)

ment which serves as prāyas'citta, say that (the passage lays down) the mere exemption (of those people) from legal punishment, while in other countries both legal punishment and penance will have to be suffered.[1] Vyāsa (says):

The decision (of a litigation) between merchants, craftsmen and such others and between those who subsist on agriculture and the stage cannot be given by others (who know nothing of these avocations); but it should be assigned to those only who are well versed in these (avocations).[2]

Manu (8. 390) says:

The king who desires his own welfare should not (himself) declare a special decision in the case of men of the three higher castes who have a dispute among themselves in connection with the orders (ās'ramas) to which they belong (i.e. as brahmacārins, householders &c.).

Kātyāyana (says):

At the (proper) time, (the king) should question the petitioner who bows to him and stands before him 'what is your business and what is your grievance; do not be afraid and speak out, man! By whom, where, when and from what (motive were you troubled)'? Thus he should question the (applicant) when he comes to the court. Having considered along with the ***sabhyas*** and the brāhmaṇas what he speaks when thus questioned, (the king), if the cause be proper, should then hand over to him (to the applicant) a seal (i.e. order under seal) or should order the servant (called ***sādhyapāla*** above) for summoning (the defendant).[3]

Nārada (p. 17 v 47) says:

The applicant who has a dispute may put under restraint or arrest (the defendant) who does not stand up to meet (i.e. who absconds or avoids) the claim that is to be investigated or who minds not the words of the claimant, till the approach of the summons (i.e. the sealed order or the ***sādhyapāla***).

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1. According to the plain words of the text the doing of the various acts in the respective countries does not render the people liable to incur punishment nor to undergo prāyas'citta; some say that they escape only punishment at the king's hand (but are liable to undergo prāyas'citta) in those countries, while in other countries people guilty of these acts would be liable to undergo both prāyas'citta and legal punishment. People guilty of offences were supposed to be purified by undergoing punishment at the hands of the king (i. e. legal punishment was a kind of *prāyaścitta*). *Vide* Manu 8. 318.

2. Vide *Raghunathji v. the Bank of Bombay* I. L. R. 34 Bom. 72, 78 (=11 Bom.L.R. p.255) where this passage is quoted and it was held that where the manager of a family firm borrowed for the family firm without legal necessity the debt would be binding even on minor members. Mandlik translates 'raṅgopajīviṣu' as 'among dyers' but this is wrong. The usual meaning of 'raṅga' is 'theatre or stage'. Mandlik himself on p. 24 translates 'raṅgāvatāri' as 'performer on the stage'. This text does not mean that the king is not to decide those matters but that he should not decide them hastily without the aid of experts.

3. In Sanskrit the same word is used for plaintiff and complainant, as there was no clear-cut distinction made in *ancient* India between civil and criminal courts and procedure.

The same author (Nārada p. 17 v. 48) mentions four kinds of (*āsedha*) restraints (by the applicant, of the defendant):

> Confinement to a place, restriction as to time, preventing from going on a journey and prohibition from doing certain specified acts (such as exposing goods for sale); restraint is thus of four kinds. One thus subjected to restraint should not transgress it.[1]

The same author (Nārada p. 18 v. 51) lays down the punishment for him thus restrained who transgresses the restraint :

> One who is arrested being fit to be arrested and who transgresses it deserves punishment.

*The same author (Nār. p. 235 v. 13) declares that in some cases the person who restrains (the defendant) himself incurs punishment :

> He, however, who inflicts restraint (upon the defendant) in such improper ways as stopping the senses or (stopping) speech or breathing deserves to be punished and not (he who breaks away) from such restraint.

Nārada (p. 18 v. 49) declares the absence of punishment in certain cases even when (the defendant) breaks through the restraint :

> One, who is placed under restraint while crossing a river or when in an impassable forest, or in a difficult place or in an over-whelming calamity (overtaken by ***vis major*** or king's enemy) and the like, shall not be guilty of an offence if he breaks away from restraint by another (in such cases).

Kātyāyana prescribes punishment for him who puts under restraint those that do not deserve to be restrained :

> He that restrains another not liable to be restrained should be punished by the king ; this is the established rule.

The same author enumerates those who ought not to be restrained:

> Those who have climbed up a tree or a mountain, those who are seated on an elephant, horse, chariot or vessel and persons placed in a dangerous situation; all these should not be subjected to arrest by those who seek to establish their claims ; as also persons afflicted with diseases or misfortunes and one who is engaged in a sacrifice.

Nārada lays down the following rules as to summoning (the defendant):[2]

> The king should not cause to be summoned the diseased, minors, the old, persons in a difficult situation, persons engaged in religious duties, one who would be seriously ruined (if then summoned), one who is under a calamity (a bereavement &c.), one who is engaged in the king's business or in celebrating a (religious) festival, persons intoxicated or possessed,

1. Compare section 95 of the C. P. Code of 1906.

2. These verses are ascribed to Kātyāyana by the Vir. (p. 52) and to Hārīta by the Smṛticandrikā and are not found in the printed Nārada ; but compare Nārada I. 52—54.

* P. 9 (text)

mad men, those involved in grief, servants; nor a young woman who has no relatives, a woman of a respectable family, a woman who is recently delivered, a maiden of the highest caste; (because) these (females) are declared to be dependent on their kinsmen (*and their kinsmen should be summoned and not they*). It* is allowable to summon those women upon whom their families are dependent, those who are profligate and who are prostitutes, as also those that have no family (i.e. who are of low birth) and those that are sinful. Having understood the matter complained of the king should summon in weighty matters even ascetics who have repaired to a forest, but without offending them. Taking into consideration the time and the place and the importance or otherwise of the causes the king may very slowly cause to be brought even the diseased and others (enumerated above).

In some (copies) the reading is 'yānaiḥ' (in palanquins or other conveyances) for the word 's'anaiḥ' (slowly). A person who being summoned does not attend should be punished. And to the same effect is Bṛhaspati (p. 288 v 35);

Where a person being summoned and having relatives and family[1] does not attend through arrogance, the king should fix a punishment for him according to the (importance of the) matter in controversy.

Kātyāyana prescribes different fines according to the difference in the matters of controversy (for not attending when summoned):

If the matter be insignificant the fine shall be fifty (paṇas[2]), if it be of a middling character, the minimum fine should be one hundred, in serious matters the fine should always be not less than five hundred (***paṇas***).

Pitāmaha speaks of what is to be done after the arrival of the person summoned :

The person complained against (i.e. the defendant) together with the plaintiff should be made to stand in front of the court.

The instrumental (in ***vādinā***) is here used in the sense of 'together with' (and not in the sence of agent). Kātyāyana says:§

There (in the court) the complainant (or plaintiff) should first speak out (his case) and after him the defendant. At the end of both the members of the court (the assessors) should speak out (their views) and after them the presiding judge (***prāḍvivāka***).

Bṛhaspati (p. 290 v 4 and p. 288 v 34) says:

When a plaintiff and his opponent (or several pairs of plaintiffs and their opponents) approach (the court), each saying 'I should be heard first'

1. Relying on the support of his relatives or his noble birth he treats with scant courtesy the summons and hence he is to be punished for contempt.

2. Kātyāyana as quoted in the Sm. C. says that wherever a figure is mentioned as a fine for a wrong and nothing more is specified the figure refers to *paṇas*. Vide notes to V.M.p.19

* P. 10 (text). § P. 11 (text).

the plaints should be recorded in the order of the castes (of the applicants) or after considering (the gravity of) the wrong (in each case). In the case of persons who are not bold (or mature in intellect), who are idiots, insane, infirm on account of old age, women, minors or diseased, a relative or some other person appointed (to represent them in the litigation) may declare the plaint or the reply.[1]

Nārada (p. 29 v. 22) says :

> Whether a person be appointed by the plaintiff or be instructed (to appear in court) by the defendant, success or failure belongs to him for whom he carries on the litigation.

As to the text of Kātyāyana (this is Nārada p. 29 v. 23),

> Where a person, not being a brother or father or son or a servant, undertakes another's litigation and speaks out (generally falsely) in judicial proceedings, he is liable to be punished,[2]

it refers to persons who are not appointed (as agents). The same author declares that in certain cases an agent (to conduct a litigation) cannot be recognised (by the court):

> In (judicial proceedings for) the killing of a brāhmaṇa, drinking liquor, theft, adultery with preceptor's (elder's) wife, manslaughter, theft, touching (violating) another's wife, eating forbidden things, seduction and defilement of a virgin, violence (of language and actions i.e. slander and assault), forgery, treason, no deputy (or substitute) shall be given and the party who does the act shall himself carry on the cause.

(In the above passage) the word 'steya' (theft) is repeated in order to lay down an absolute prohibition of a deputy (in the case of such offences as theft[3]). *'Prativādi' means 'pratinidhi' (a subsititude or deputy).

When the defendant is brought (before the court) Yājñavalkya (2. 6) describes what is to be done by the plaintiff :

> What was alleged by the plaintiff before the defendant was called should be written down in the presence of the defendant and should be marked (furnished) with the year, the month, the fortnight, the day, the names (of the parties), their caste and the like.

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1. This verse makes provision for the appointment, in the language of modern law, of a next friend or a guardian *ad litem* for minors, idiots and insane persons and recognised agents. Compare C. P. Code of 1908, Order 32 for the former and Order 3 r. 1--2 for recognised agents.

2. This verse lays down a rule that resembles the English law of champerty and maintenance.

3. The Vir. tells us that this is the explanation given by the Madanaratna, which seems to have been followed by Nīlakaṇṭha. The Vir. itself prefers to explain the first word 'steya' as standing for the theft of gold (which was one of the five mortal sins according to Manu XI. 54) and the second 'steya' for theft in general. This explanation is better as the first word 'steya' is placed in the midst of the other mortal sins.

* P. 12 (text)

In another *smṛti* (it is said) :[1]

That is termed bhāṣā (plaint or complaint) which is presented to the king and which exhibits an artha (cause of action); which is possessed of the good characteristics (of a plaint such as being concise &c.); which is full (i. e. fully states the subject matter of litigation); which is free from ambiguity; which distinctly states the point to be established; the words of which are employed in their primary sense (and not figuratively);[2] which conforms to the statement made (at first before the defendant came); which deals with things well known (i. e. is intelligible to any ordinary person); which contains no inconsistencies; which is definite (and not vague) and capable of proof; concise and (yet) exhaustive; which is not impossible with regard to place and time; which contains the year, the season, the month, the fortnight, the day, the hour, the country, the district, the village, the house, the name or description of the subject matter of dispute, the caste, the personal appearance, age, the measure and quantity of the subject matter, the names of himself (the plaintiff) and the defendant; which is marked with the names of ancestors of himself and of the opponent and the names of several kings (during whose reign the parties and their ancestors lived); which states the reasons for forbearing (to sue for some time) and the loss caused to himself; which narrates (the names of) the original receiver (donee) and donor.

The use in the case of pledge and the like of the year and the like occurring in this passage will be stated (later)[3]. The use of the country and the like in some cases is declared in another *smṛti* :

In suits for immoveable property, these ten should be entered (in the plaint) viz. the country, the village, the site (i.e. with boundaries), the caste and names (of the parties), the neighbour, the dimensions and the name of the field the names of *the father and grandfather (of the parties) and mention of former kings.

Kātyāyana (says) :

The ***prāḍvivāka*** (judge) should write down on a board with chalk the plaintiff's statement as made by him in a natural manner and then on a leaf (or paper) after it is amended.

1. These verses are ascribed to the Saṁgrahakāra in the Smṛticandrikā, the Parās'ara, mādhavīya and Vir. With these *requisites of a plaint* may be compared Order VI rules 2, 7 and Order VII rules 1-3, 6--7 of the C. P. Code.

2. This may also mean 'which contains no digressions'.

3. The statement of the year, month &c is not useful in all judicial proceedings, but only in some, such as those about sales, gifts and mortgages e. g. if the same property is twice mortgaged the first prevails over the second and hence the years of the transactions are important. The author refers to the verse of Kātyāyana quoted by him in the section on ādhi--'adhim-ekam dvayor yastu'. The Sm. C, and the Vir, ascribe these verses to Kātyāyana,

* P. 13 (text).

Nārada (p. 25 v. 7) declares the time for amendment (of the plaint):

He (the judge) may amend the plaint as long as the reply (of the defendant) is not presented. Amendment (of the plaint) should cease when it (the plaint) is hemmed in by the reply. As[2] long as the defendant does not enter his reply to the plaint, so long the plaintiff may cause to be entered (in the plaint) whatever matter may be desired to be expressed by him.

These being the characteristics of a (proper) plaint, faulty[3] plaints that are of an opposite nature to it (to a proper plaint) are (expressly) declared in another smṛiti,[4] though they follow as a matter of course (impliedly);

The king should reject a faulty plaint viz. one which is unknown, that discloses no injury (of which the court could take cognisance), that is meaningless, that gives no cause of action (to the plaintiff), that is incapable of proof, that is self-contradictory.

" Aprasiddha ' (exemplified by) ' my skyflower has been stolen '. ' nirābādha ' (disclosing no injury) by 'he works with the light of my lamp'; nirartha' (is exemplified) by ' my *kacaṭatapa* was stoten '; ' niṣprayojana ; (by) ' my neighbour studies with fine intonation '; 'asādhya' (by) ' I was derided by this man with a knit eyebrow '; 'viruddha' (by) ' I was abused by a dumb man '; ' viruddha ' also means ' what is *opposed to* (the usages of) a town or country ', as is declared in another smṛti:

That which is forbidden by the king, what is opposed to (the interest of) the citizens or of the whole nation and also of the councillors; others* again which are opposed to a town, village, or large groups of people; all these causes are declared to be inadmissible (i. e. such plaints as the king would not entertain).

Nor can it be said that if a plaint contains more matters of grievance than one it would be a faulty plaint, as to hold so would be in conflict with the *dictum* of Kātyāyana:

A king from a desire to find out the truth should undoubtedly admit even that plaint which contains many propositions (grievances) if it is definite so far as judicial procedure is concerned (i. e. each proposition is supported by distinct evidence).

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1. For amendment of plaint, compare Order 6 rule 17 of the C. P. Code.

2. This verse alone occurs in the printed Nārada (2-7).

3. 'Faulty plaints' mean plaints that appear to be so but are really faulty and would be rejected by the court.

4. The Vir. ascribes this verse to Kātyāyana. For skyflower, vide above notes on introductory v. 4; ' ka ca ṭa ta pa ' are the first letters of the five classes of consonants and the collocation of these makes no sense . Vide notes to V. M. p. 24 and p. 25 and Kāt. v, 140. for detailed explanations of these terms.

* P. 14 (text).

As to the text —

> A plaint containing several ***padas*** (***vyavahāra-padas***, causes of action) cannot hold good

it is to be explained as meaning that such a plaint (containing several causes of action) cannot be simultaneously proceeded with (as to all causes) but only step by step (i.e. the causes will be investigated one after another[1]).

The plaint being thus reduced to writing Yājñavalkya (2.7) describes what is to be done thereafter:

> The reply (of the defendant) who has heard the matter (of complaint) should be written down in the presence of the plaintiff :

[2]Nārada defines the reply (of the defendant

> Men versed in the (law) hold that to be a (proper) reply which meets (all the points raised in) the plaint, which is pithy (or reasonable), unambiguous, not inconsistent (with itself), which is intelligible without explanation.

Kātyāyana mentions the four varieties of it (i.e. of the reply):

> A reply is of four kinds, viz either by denial (of the allegations in the plaint), by confession (or admission), by a special plea, or by the plea of a former judgment (i.e. by the plea of ***res judicata***).[3]

*The same author defines a reply of denial :

> If the defendant should deny the claim (of the plaintiff) that reply is known in judicial procedure as one of denial.[4]

The same[5] author declares that (the reply of denial) to be of four kinds :

> 'This is false', 'I do not know', 'I was not present then', 'I was not born at that time' ; thus the (reply by) denial is of four kinds.

The answer by confession is described in another smṛti :

> Statement (by the defendant) of the truth of the claim (made by the plaintiff) is declared to be the answer by confession.

Nārada defines the reply of special plea (or admission and avoidance):

> If the defendant admitting the allegations set out in the plaint puts forward a plea, it is known in the smṛtis as a reply of special plea.

Kātyāyana describes the reply of former judgment :

1. This is a dictum of Kātyāyana. For explanation of these two *dicta* of Kātyāyana vide notes to V. M. pp. 25--26 and Kāt. vv. 136-137
2. This is not found in the printed Nārada.
3. Compare the very similar words of Nārada p. 25 v 4.
4. This is ascribed to Bṛhaspati by the Vy. Māt. and Par. M,
5. This is the same as Nā p. 5 v 5.

*P. 15 (text).

[1]If (a person), although (once) defeated in a judicial proceeding, again has a (plaint) written out, he should be addressed 'you were formerly defeated'; this is called the plea of former judgment.

These being the characteristics of a (proper) reply, it follows as a matter of course that those replies that are destitute of these (characterestics) are faulty replies; yet they are expressly stated in another smṛti :[2]

A reply that is ambiguous, that is not to the point (in dispute), that is very concise or very prolix,[3] that meets only a part of (the allegations in) the plaint, cannot be (proper) reply.

A reply that sets up another title of law (i.e. that sets a cause of action different from the one stated in the plaint), that does not meet all the particulars in the plaint, that is of mysterious (or veiled) import, that is inconsistent, that is intelligible (only) after explanation, and that is opposed to reason (or that is void of substance), does not serve the purpose (sought by a reply).[4]

*Kātyāyana also (says):

The reply, which is one of confession (or admission) as to a portion of the plaint (i.e. as to one count therein), which is a reply of a special plea as to another portion (of the plaint) and which is a reply of denial as to a different portion (of the plaint) is not a proper reply on account of the blending (of several pleas in one).[5]

The same author states the reason why it (such a reply) is not a proper reply :

In the same litigation the burden of proof (***kriyā***) cannot rest on both litigants, nor can both succeed in their object, nor can two methods of proof be resorted to at one (and the same) time.[6]

The meaning of this passage is as follows :—

In a blending (joinder) of the replies of denial and special plea it follows that the burden of proof lies on both the litigating parties (plaintiff) and defendant), as Nārada declares:

In (the reply of) denial, the proof rests upon the plaintiff, in (the reply of) special plea on the defendant.

1. This is ascribed to Nārada by Aparārka, to Bṛhaspati by Par. M. and to Kātyāyana and Bṛhaspati by Vir.

2. The two verses are ascribed to Kātyāyana in Aparārka, Vy. Māt. and Sm. C.

3. These words may also mean 'that admits either much less or much more than what is alleged in the plaint'.

4. For detailed explanation of these verses vide notes to V. M. pp. 28--29, and Kātyāyana vv. 173—175.

5. Mandlik omits the translation of 'Saṅkarāt'.

6. '*Kriyā*' means 'means of proof' and also 'burden of proof'. For illustrations and detailed explanation of this and the preceding verse, vide notes to V. M. pp. 29—31 and Kāt. vv. 189—190.

* P. 16 (text)

To have burden of proof on both the parties (to a litigation) in the same suit is contradictory (or inconsistent). So also in a combination of (the replies of) special plea and former judgment, the defendant alone has to *discharge a double burden of proof*, since Vyāsa says:

In putting forward a reply of former judgment and of special plea it is the defendant who should exhibit the proof.

And here on account of a text of Vyāsa himself 'in a plea of former judgment by the decree and by the (testimony of) prāḍvivāka and the like (defendant has to establish his case), ' in the plea of former judgment the case is to be established by (production of) the decree or by (the testimony of) those who took part in the former judgment, while in a reply of special plea, (the case is to be established) by means of witnesses, documents and the like. And so in this (combination of two replies) there is conflict. The same is to be understood in the combination of three or four replies. These (combinations of several replies in the same suit) constitute improper replies only when they are (pursued) simultaneously, but when (pursued) one after another, they are proper replies. The order (in which they are to be pursued) rests on the will of the plaintiff, the defendant and the sabhyas. And Hārita also says:[1]

If in the same litigation there be (a combination of) both, viz. a reply of denial and of special plea or there be (a reply of) admission along with any one of the other (three kinds of reply), then in such a case, what reply should be taken up (first for investigation)? (The answer is) in such a case that reply which is concerned with more valuable or important matters (alleged in the plaint) or whereby the result due to the adducing of proof will follow (quickly or easily) should be regarded as the reply and it becomes free from the fault of confusion (of replies); but otherwise[2] (the reply would be liable to the fault of confusion).

*The words ' it becomes liable to the fault of confusion ' are to be understood (in the above passage). The meaning of this (passage) is: when there is a claim for gold and clothes, in the case (of a reply) that gold was not received and that clothes were received but returned, the judicial proceeding should first be carried on in regard to gold and then with regard to clothes.[3] The same (rule) should be applied in regard to the combination of the reply of denial and of former judgment and of the reply of special plea and former judgment. In the same claim (for gold and clothes), if it be replied that

1. The following verses lay down the order in which in certain cases, independently of the will of the parties, several issues raised by the defendant are to be taken up for investigation. These verses are attributed to Vyāsa by Aparārka and Vy. Māt, both of which add a half verse ' In the case of the combination of the replies of denial and special plea, the the latter should be taken up first.'

2. This means ' if the rule contained in the preceding were not followed '.

3. As gold is the more valuable out of the two.

* P. 17 (text).

gold was taken but that clothes were not taken or were returned (after being received)or that (the plaintiff) was defeated (in a lawcourt) in regard to clothes, then the judicial proceeding should be carried on with reference to clothes only and not with reference to gold, since though (gold) is more valuable, there is no necessity of proof in regard to it. Where the claim being ' this is my cow, she was missing on a certain day, she is seen to-day in this person's (the defendant's) house ' and the reply being ' this is false, the cow was in my house even before the time indicated in the plaint ', the reply though a combination of the replies of denial and special plea is not a faulty reply, since it meets the whole plaint (all the points in the plaint). This is a reply of denial together with a special plea. Here the burden of proof rests on the defendant alone, not on the plaintiff also,[1] since Hārīta says 'in a reply of denial and special plea, the reply of special plea must be taken up (for investigation). ' In the same way when there is a combination of the replies of denial and former judgment and of the replies of special plea and former judgment, they are not faulty replies, if such combinations meet the whole plaint. Here in both cases the burden of proof lies on the defendant alone. Hence in no judicial proceeding whatever does the burden of proof lie on both the parties (at the same time). This will suffice (to explain the above passage of Kātyāyana).[2]

After the reply has been recorded, the proofs are to be exhibited and Yājñavalkya (II. 7-8) declares the order (in adducing proof):

> Then the plaintiff should at once cause to be written the evidence (which he proposes to adduce) for establishing the matter alleged (in the plaint). If that (evidence) holds good he obtains success, if it be otherwise (i.e. if it does not hold good), the reverse is the case (i. e. he is defeated).

*This (verse) applies as regards a reply of denial, but in other kinds of replies it is the defendant only who has to adduce evidence, as Hārīta says:

> In a reply of former judgment and of special plea the defendant should exhibit the proof, but in a reply of denial, the plaintiff (should exhibit it); in the reply of admission, there is no need for it (for proof).

Yājñavalkya (II. 8) thus declares that a judicial proceeding has four parts (stages):

> This judicial procedure is shown (by me) to have four parts (stages) in litigations.

And the four parts (of ***Vyavahāra***) are clearly set forth in another smṛti:

> (***Vyavahāra***) is said to be fourfold as in it enter four parts on account of there being the plaint, the reply, the proof and the decision that come in order one after another.

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1. The burden of proof in a pure reply of denial is on the plaintiff and in a pure reply of special plea on the defendant. As this is a reply of denial and special plea it may be argued that the *onus* of proof is on both. To this a reply is given here.

2. For detailed explanation vide notes to V. M. pp. 32—35.

*P. 18 (text).

But this (*dictum*) applies to all replies other than a reply of admission, since a reply of admission has only two parts, as Bṛhaspati says:[1]

> In a reply of denial, *Vyavahāra* has four parts and also in (a reply of) special plea; but in replies of admission it has two parts (only).

Yājñavalkya (II. 9-10) says:

> (A defendant) should not countercharge (or counter-claim against) the plaintiff (or complainant) until he has met the claim (made against him). One who is already labouring under a claim (should not be allowed to be charged) by another (until he is free from that litigation). (The plaintiff) should not change what he has already stated.[2] In quarrels (violence of speech and act, i. e. defamation and assault) and in offences in which force enters a counter charge is allowable (even before clearing one-self from the original charge or claim).

*Nārada (p. 29 v. 24) says :

> That man who, abandoning his former ground of claim, has recourse to another shall be regarded as a losing party, since he wanders from one ground of controversy to another.

The person who shifts his pleading is liable to fine but he does not lose the suit he has brought. This is the meaning. This (rule) should be understood as applying to civil proceedings[3] as the same author (Nārada p. 29 v. 25) says;

> In all civil disputes (a litigant) does not lose (altogether) for verbal deceit (i. e. for changing his statements). In disputes about (seducing) another's wife, about land and non-payment of a debt, the party though liable to be punished (for fraudulent speech) does not lose his property.[4]

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1. When there is an admission of plaintiff's claim there is no necessity to adduce proof and so there is no *kriyā* and the moment there is an admission there is nothing to be established by examination of evidence, but judgment follows at once. Hence there is no sādhyasiddhi.

2. These words may apply not only to the change of pleading by plaintiff, but also to the change of pleading by defendant. The Mit. takes it to apply to the plaintiff's change of pleading, while Par. M. applies it to both plaintiff and defendant. Vide notes to V. M. p. 38. The words 'what was alleged should be written down in the presence of the defendant' refer to the things about which allegations were made (i. e. if the plaintiff first complained about theft of rupees, he cannot write down theft of clothes), while here he is forbidden to change the title, i. e. if he alleged that one hundred rupees were borrowed at interest he cannot allege that they were stolen from him by the defendant.

3. The eighteen titles of law are classified as either dhanamūla or hiṁsāmūla (arising out of property or injury i. e. civil or criminal). Vide notes to V. M. p. 7.

4. The printed Nārada reads 'Pas'ustrīyo'—meaning 'in disputes about cattle, women'. This verse means that in civil disputes a man does not lose *his case* altogether by a change of pleading, though he may be fined; but in criminal matters, his complaint may be dismissed altogether if he shifts his position.

* P. 19 (text).

The latter half (of the verse) serves as an illustration of the first half. Yājñavalkya (II. 17) says;

> When there are witnesses in support of both sides (i. e. both the plaintiff and the defendant) the witnesses for the plaintiff (are the means of proof); when the plaintiff's allegation is brought down (from its position of having to be proved), then (the witnesses) of the defendant (are to be heard first)[1]

'Pūrvavādinaḥ' means 'of the plaintiff'; 'pūrvapakṣa' means 'the plaint'; 'adharībhūte' means 'not requiring to be established because the defendant admits (the allegations of fact in the plaint) by putting forward a reply of a special plea.' The mention of witnesses is intended to include (by implication) other means of proof also. The same author (Yāj. II. 10) says:

> A surety should be taken from both (plaintiff and defendant) who would be able to satisfy the final decision. [2]

The word 'kāryanirṇaya' means 'the result of (or carrying out) the judgment'. Kātyāyana enumerates those who cannot be accepted as sureties:

> Neither the master, nor an enemy (of the litigant), nor one authorised (or employed) by the master, nor one who is under restraint (or in jail), nor one who is sentenced to pay a fine, never one who is in danger (of life i.e. seriously ill), nor a coparcener (or heir), nor one who is penniless, nor one who is banished to another country, nor one appointed to state service nor those who have entered the fourth order (i. e. ascetics), *nor one unable to pay (the claim of) the (judgment) creditor and an equal amount of fine to the king, nor one entirely unknown, should be accepted for the purpose of a surety.

'Niruddhaḥ' means 'one who is bound by chains and the like'; ***s'ams'ayasthaḥ'*** means 'one in a difficulty'; ***'rikthī'*** means 'one who is enitled to inherit the property such as a son, grandson and the like'; ***'riktaḥ'*** means 'poor'; ***'anyatra vāsitaḥ'*** means 'banished from the country'. Yājñavalkya (II. 52) says :

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1. This verse is interpreted in two ways. The Mit. explains :— When there are witnesses on both sides, those witnesses who support the party that says that he was the first to enjoy the subject-matter of dispute are to be first examined. When the plaintiff's allegations have become weak or of little importance (owing to defendant's having admitted the prior state of things but having put forward a subsequent ground in avoidance of the prior state of things), the witnesses of the defendant should be examined first. The interpretation of Aparārka, the Vyavahāramātṛkā and Nīlakaṇṭha is :—in a reply of denial it is for the plaintiff (the man who comes to the court first) to cite witnesses (or other evidence) for proving his case, but in the case of reply of special plea or former judgment, it is for the defendant to adduce his evidence first. The difference turns on the meaning attached to the word 'pūrvavādinaḥ'. Vide notes to V. M. pp. 40–41 for detailed explanation.

2. i. e. who would be able to pay up the decretal amount and the fine to be paid to the king.

* P. 20 (text).

The relation of suretyship, of creditor and debtor, and of being a witness, is not allowed by the smṛtis among brothers, between husband and wife [1]and between father and son, so long as they are undivided.

Kātyāyana declares (the consequences) if there be no surety:

If there is no surety for a party, who is able to meet the judgment (i.e. pay the decretal amount and fine), then he (that party) should be kept under guard and at the end of the day he should pay the wages of the servant (who guarded him).

The same author says;

A person of the regenerate classes unable to furnish a surety should be guarded by those (servants of the king) who are outside (the court); but (the king) should put in chains s'ūdras and the like who cannot furnish a surety.

Nārada (p. 29 v. 24) describes the characteristics of a losing party;

That man who, abandoning his former statement (or ground of claim), has recourse to another, should be regarded as a losing party on account of his wandering from one plea (to another).[2]

*Yājñavalkya (2. 13-15) describes a person who (whose testimony) is vitiated (and is therefore unacceptable in court);

He, who moves from one position to another (i. e. who is restless when giving evidence), who licks his lips, whose forehead perspires, whose face changes colour, who utters his words with stammer and with a dry tongue, who speaks much and incoherently, who does not heed the speech or eye (i.e. who doe not reply straight to the judge's question nor fix his eye on the judge), who contorts his lips, who exhibits change from his ordinary (natural) state, in mind, speech and bodily actions, he is declared to be a vitiated person as regards a complaint or being a witness.

'Sṛkkiṇi,' means 'the corners of the lips.'

Now (begins) the exposition of the means of proof.

Yājñavalkya (II. 22) says;

Documents, possession and witnesses are declared to be means of proof. In the absence of (even) one of these, one of the super-natural (modes of proof) is prescribed.

Kātyāyana also (says) :

If one (litigant) puts forward human means of proof and the other (his oppcnent) relies on divine (means of proof), the king should in such

1. Vide notes to V. M. p 42 as to separation between husband and wife. Āpastamba (Dh. S. II. 6. 14. 16) declares that there can be no division between husband and wife, but the Mit. explains that the words apply to religious rites and not to wealth.

2. Vide p. 18 above for the same verse,

* P. 21 (text),

a case accept (rely upon) the human evidence and not upon the divine (test). If human proof is offered by litigating persons, though it meets only a (substantial) portion (of the whole claim in the plaint), it should be accepted (relied upon) and not supernatural proof, though the latter may be complete (i.e. may completly cover the whole claim in the plaint). *In disputes, when witnesses are available, supernatural proof is not allowed and when there is a document,[1] no ordeal nor witnesses (should be relied upon). As to the peculiar conventions of *pūgas* (communities), *s'reṇis* (guilds of traders) or *gaṇas* (tribes), writing is the (proper) means of proof and not ordeals nor witnesses. [2]Where a thing is promised to be given but not delivered, where a thing is (given and then) taken back, in the matter of determining the owner (of a thing), in the matter of taking back a thing after it is sold, when one after purchasing a thing does not desire to pay the price, in gambling and betting (on animals) when a dispute arises, (in one of these cases) witnesses are declared to be the means of proof and not ordeals nor documents. In (disputes about) the making and use of doors and ways and about water-courses and the like, possession alone is weighty, neither writing nor witnesses.

Bṛhaspati (p. 315 vv. 1-2) declares the superiority of supernatural proof in certain cases:

One who fabricates (or counterfeits) jewels, pearls and coins, who misappropriates a deposit entrusted to him, one who injures another, one who has intercourse with another's wife, these should always be tried with oaths.[3] In charges of deadly sins, if a party resorts to ordeals when witnesses are available, (the king) should not examine witnesses.

‡Vyāsa (says):

(If a person says) 'I did not pass this document, it was falsely made (forged) by him (by the opponent),' disregarding that document, the decision as to that matter should be by means of ordeal; (where a wrong takes place) in a forest or in a lonely place, at night, inside the house, in cases of *sāhasa* and when a deposit is denied a divine mode of proof is allowable.[4]

Bṛhaspati (p. 317 v. 17) says :

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1. Compare sec. 91 of the Evidence Act.

2. The first two here fall under Dattāpradānikavyavahārapada; the next may also mean 'when there has to be a decision between the master and the herdsman'; the next comes under krayavikrayānus'aya. The verse 'dattādatte &c.' as quoted in the *nibandhas* presents a bewildering variety of readings. The verse about the making and use of doors is referred to in *Lallubhai* v *Bai Amrit* I. L. R. 2 Bom. 299 at p. 315.

3. Both oaths and ordeals are supernatural (*daiva*) means of proof, the former being employed in less serious wrongs. Vide notes to V. M. p. 45 for explanation,

4. This last verse is Nārada (ṛṇādana 241),

* P. 22 (text). ‡ P. 23 (text).

Where a doubt arises as to a document or the statements of witnesses and where inference is uncertion, ordeal is the means of clearing up (the doubt).

The same author lays down an option between witnesses and ordeals in certain cases:

When the dispute relates to *sāhasa* (robbery and the like), in cases of violence of injury and speech (assault and defamation) and in all matters springing from the use of force either witnesses or ordeals (are admissible as proof). In debts, either a document, witnesses, even some reasoning or supernatural modes of proof are allowed from a desire for the good of the people. [1]

'*Yuktiles'a*' means 'a portion of reasoning'; '*vācike pāruṣye*' means in defamation consisting of abuse or reviling in the form 'you are the slayer of a brāhmaṇa'. As for the text of Kātyāyana 'in violence of words and in (disputes for) land ordeal should not be resorted to,' it refers to libels of a petty character. The mention of land includes (by implication) inmoveable property of every kind, as Pitāmaha says 'in disputes about immoveable property, ordeals should be excluded'. This prohibition of ordeals holds good when witnesses are available; and the same author (Pitāmaha) says to the same effect 'one should support these disputes (about immoveables) by witnesses, documents and possession.' The same author (says):

*In cases where there exists no writing nor possession, nor witnesses and there is no scope for ordeal, the king is the authority (he should decide as he thinks fit). In the case of disputes of an uncertain character, which it is not possible to determine (with the usual means of proof), the king is the authority, since he is the lord of everything.

Now (begins the discussion of)writings.

On this Bṛhaspati (p. 304 v. 3) says:

Writing is declared to be of three sorts, viz, writing of the king, that written at a particular place[2] and that written in one's own hand. Their subdivisions again are numerous.

As to the text of Vasiṣṭha, 'writings are known to be of two kinds viz. popular and royal, wherein a two-fold division is declared, ' that is due to non-recognition of a difference between writings written at a particular place and those written in one's own hand. The words *laukika* and *jānapada* are synonyms, as the author of the Saṅgraha says 'writings are declared to be

1. These two verses are ascribed to Kātyāyana by the Par. M.

2. 'Sthānakṛta' (written in a particular place) seems to mean written in a well-known public place by professional scribes appointed by the king or his officers and attested by witnesses. This was probably a substitute for the modern requirement of registration.

* P. 24 (text)

of two kinds, viz. royal and *jānapada* (popular, of the common people) Bṛhaspati (pp. 304-5 vv. 4-11) says:

Popular writings are sevenfold, viz. partition (deed), gift-deed, purchase, mortgage deed, (deed of) conventions, deed of service (or bondage), a deed of debt and the like. Royal writings are of three kinds. Where brothers, divided among themselves according to their wishes, make a document of separation, that is called a partition deed. *That writing which, on making a gift of land, a person executes and which is (intended) to last as long as the sun and the moon endure and that is not to be cut down (as to the extent of the gift) nor to be resumed, [1]is known to be a deed of gift. When a person, having bought a house, a field and the like, causes a writing to be made containing words that state the exact price (paid or agreed), that is called a deed of purchase. That is called a deed of mortgage (or pledge) when a person gives movable or immovable property as a pledge and makes a writing which requires (the pledge) to be either preserved (intact without enjoyment) or to be enjoyed.[2] When (the people of) a village or a country execute a document in furtherance of *dharma* (i. e. laying down some rule or convention of conduct), on which there is common agreement, which is not opposed to the (interest or orders of the) king, that is said to be a deed of conventions. That document, which a person, destitute of food and clothes in a forest, makes stating 'I shall do your work (or the tasks you will appoint),' is called a bond of service (or serfdom). That document of future repayment (*uddhāra*) which a man, having borrowed money at interest, executes himself or causes to be written (by another) is termed by the wise a bond of debt.

On account of the word *ādi* (in the first verse above) documents of purification and the like are also included (in the enumeration of kinds of writings). Kātyāyana describes a deed of purification and the like:

When a person has performed the (prescribed) penance and become free from the accusation (of having committed a forbidden act) the deed attested by witnesses given to him is known as a deed of purification. That writing is known as a deed of peace which recites what happened (by way of compromise or settlement) when an accusation is brought (against a a person) before all the leading people.[3] When a boundary dispute is decided, the writing (made) is ordained to be a deed of (settlement of) boundaries.

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1. Vide notes to V. M. p. 48 for the terms used here.

2. A pledge is either of moveables or of immoveables; in either case the creditor may be either entitled to use it or he may be required not to use it but only to preserve it with him.

3. This verse is somewhat obscure. It probably refers to the settlement made by the leading people of the place in case of an accusation made before them.

* P. 25 (text)

*Prajāpati describes a submortgage:

If the creditor hypothecates to another the thing already pledged with him for the same amount (for which it was pledged with him) he should pass a (fresh) deed of mortgage (or pledge) and should hand over the prior (deed of mortgage or pledge) to him (to his own creditor).

Yājñavalkya (II. 94) also (says):

When (a debtor) has paid off the debt he should have the deed (of debt) torn off or he should cause a new writing to be passed (by the creditor if the original be lost or inaccessible at the time) for the purpose of (being able to establish) his freedom from the debt.

Nārada (p. 75 v. 135) mentions the difference between writings in one's own hand and in another's hand referred to already :

Writings are of two kinds, viz. those made in one's own hand and those made in another's hand and not having attestation and having attestation (respectively). Their validity depends upon the usages of the country (where they are made).[1]

Yājñavalkya (II. 89) says :

A writing in one's own hand, though without witnesses, is declared by the *smṛtis* to be (legal) evidence, provided it is not due to force or fraud. *Balam* means 'force' ; '*upadhiḥ*' means greed and the like.[2]

The same author (Yāj. II. 84-85) declares a special characteristic of documents made in another's hand :

Whatever transaction is settled mutually according to their wishes should be consigned to writing attested by witnesses and having at the head the name of the creditor and should be marked with the year, the month, the fortnight, the day, the names, castes and gotras (of the creditor and the debtor), titles due to Vedic affinities, their own names and the names of their fathers and the like.

$'*Sabrahmacārika*' means a secondary name due to the (study of) the *Bahvṛca* and other *s'ākhās* (of the Veda), such as 'Bahvṛcaḥ' (a student of the Ṛgveda), 'Kaṭhaḥ (a student of the Kāṭhaka S'ākha of the Yajurveda).[3] The same author (Yāj. II. 86-88) says:

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1. What is written in one's own hand need not be attested by witnesses, while what is written in another's hand requires attestation. This verse is quoted in *Radhabai* v *Ganesh* I. L. R. 3 Bom. 7 where it was held that the court was not bound to apply strictly this rule to Hindu wills, since wills were not recognized by ancient Hindu Law and a will written by another man and signed by the testator was held to be valid, though it was not attested.

2. The primary meaning of 'upadhi' is 'a trick or deceit' and not 'greed' as Nīlakaṇṭha says.

3. Compare the Madhuban copperplate inscription of Harṣa ('Epigraphia Indica vol VII. p. 155) where the donees are described as 'chandoga-sabrahmacāri' and 'bahvṛca-sabrahmacāri'.

* P. 26 (text) $ P. 27 (text)

When the transaction (agreed upon) is completed (i. e. it is written out), the debtor should place below it his name in his own hand (adding) 'what is caused to be written above in this (deed) is assented to by me, the son of such a one ;' witnesses should write down in their own hand (their own names) preceded by their father's name ' in this matter I, so and so, am a witness.' These witnesses should be even (in number). Then the scribe should write at the end (of the document) ' this is written by me, so and so, son of such and such, at the request of both parties '.

'*Samāḥ* ' means 'equal' in number and qualifications (with the parties). In some (*digests*) there is coalescence of the letter 'a' (after 'te') and (so they read) 'asamāḥ' (meaning 'uneven in number '). Nārada (says):

If a debtor does not know the alphabet (i. e. is illiterate), he should cause his assent to be written (by another); if a witness (be illiterate) he should cause (his attestation) to be written by another witness in the presence of all the witnesses.

It was stated (by Bṛhaspati) that royal writing is of three kinds; Yājñavalkya (I. 318-320) and Bṛhaspati exhibit (*the peculiarities of*) *it* :

Having made a gift of land or a corrody the king should execute a writing (about the gift) for the information of future good kings. On a piece of cloth or a copperplate marked at the top with his seal, the king, having written down the names of his ancestors and of himself, the measurements of the thing gifted, a description of the boundaries of the thing donated,[1] should issue a permanent edict bearing the date and his own signature.

Nibandhaḥ means ' what is granted by a king and the like to be obtained at fixed times from mines and the like ;[2] ***pratigrahaḥ*** means ' that which is received as a gift such as land and the like;' ***parimāṇm*** means ' its extent ' ; ***dānam*** means ' what is gifted such as a house'; ***chheda*** means' its limits'; ***upavarṇam*** means 'their mention '. So also (Bṛhaspati pp. 306-307 vv18-19):

When a king pleased with the services, valour and the like, of a person, grants a district and the like to him by a writing, it is called a ***prasāda-likhita*** (a writing of favour) When a king, after a decision on hearing the plaint, the reply and the evidence adduced, gives a writing to the successful party, that is called a ***jayapatra*** (a writing of success, a decree)

1. ' Dāna .... varṇanam' may also mean 'setting out the smṛti passages condemning the resumption of gifts made by former kings '. This is a preferable explanation and is supported by the verses occurring in almost all grants condemning the resumption of gifts. These verses and the following passage of the Mayūkha up to *jayapatra* are quoted in *The collector of Thana* v *Hari* I. L. R. 6 Bom. 546 (F. B.) at pp. 557--558.

2. The definition of *nibandha* is quoted in *Ghelabhai* v *Hargovan* I. L. R. 36 Bom. 94 at p. 101 as showing that it is not the king alone who can make a grant of a *nibandha*.

*P. 28 (text).

Vyāsa speaks of the substitute of the king (in issuing royal edicts):

The minister for peace and war, when ordered by the king himself, may write down the royal edict on copperplate or on cloth.

The same author says that the king should write down his assent in such a case :

(The minister should write down) the boundaries and measurements and the king should write with his own hand ' this has the assent of me the king, so and so and the son of such and such.'

' Sannives'am pramāṇam ca '—these words are to be connected with the preceding text. Vasiṣṭha mentions four kinds of royal writings:

A s'āsana (edict) should be known as the first, another is jayapatra, (then there are) ājñāpatra and prajñāpanā-patra; royal writing is (thus) four-fold.[1] *That by which feudatory chiefs, officers and governors of provinces are commanded (by the king) to carry out some business is called an *ājñāpatra* (document of command). That letter by which some business is communicated to a sacrificial priest, the family priest, a preceptor and other revered and worthy persons is called a writing of request.

S'āsana and ***jayapatra*** have been explained above. Yājñavalkya (II. 91) says:

When (a document) is in another country, when the letters (or words) of it have become doubtful (or difficult to make out), when it is lost or its ink has been rubbed off, when it is stolen, torn into pieces, burnt, cut asunder, (the king) should cause another writing to be made.

Nārada (pp. 77-78 v. 142) says :

When a document is placed in another country, when it is shattered into pieces, when its letters have become effaced, when it is stolen, then time should be granted (for its production) in cases where it exists and if it does not exist, the decision must rest on the (evidence of) the witnesses (who saw it executed).

Draṣṭāraḥ means 'witnesses'; in the absence of witnesses supernatural proof (should be resorted to) as Kātyāyana says :

In a judicial proceeding where there is no writing nor witnesses, (the king or judge) should prescribe supernatural proof (ordeals etc.).

Yājñavalkya (II. 92) says :

The genuineness of a document about which there is a doubt (or dispute) may be established by (comparison with other) documents that are (admittedly) in the hand of the person (who is alleged to have

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1. Vide notes to V. M. pp. 53--54 for the quotations from Kauṭilya about ājñāpatra and prajñāpanāpatra.

* P. 29 (text).

written the document in dispute)[1] and by presumption, by the (possibility or otherwise of) the meeting together (of the parties), by proof, by marks (such as seals),by the (subsequent) relations (of the parties), by the (probability of the origin of) title, and inference.[2]

Yuktiḥ means ' presumption from circumstances ' ; ***prāptiḥ*** means ' staying together of the two parties (to a document) in the same place '; ***cihnam*** means 'the impression of a seal and the like '; ***kriyā*** means 'witnesses and the like ' (other means of proof); ***sambandhaḥ*** means ' relation in future ' (i. e. after the alleged date of the document); ***āgamaḥ*** means ' some probable mode of acquisition ' (of the document);[3] ***hetuḥ*** means 'inference.'

Prajāpati says :

'The decision about (the genuineness of) a royal writing (grant) should be made with great effort by means of the examination of the king's own signature (thereon), of the seal and of the handwriting of the scribe (of the grant).

Bṛhaspati (p. 307 vv 23-24) declares what are vitiated documents :

A document executed by a dying man, by an enemy, by one in fear, by one distressed, by a woman, by one intoxicated,[4] by one who is overwhelmed in some calamity, and executed at night by fraud or force does not become valid Where even a single witness who (whose signature) is placed on a deed is vitiated (on account of the above mentioned causes) and who is censured or where the writer of a deed is of that sort, that deed is declared to be a false document.

Here ends the section on writing.

Now (begins) Possession.[5]

Nārada (p. 62 v 85) says :

Possession acquires validity (as evidence) when accompanied by a clear title. Possession with a clouded title does not amount to proof (is not accepted as a means of proof).

1. Compare section 73 of the Indian Evidence Act.

2. For detailed explanation of the words *yukti*, *prāpti*, *sambandha*, *āgama*, *hetu*, vide notes to V. M. pp. 54--55. The Mit. and the Mayūkha widely differ in the interpretation of these terms.

3. This means that it should be seen whether the document is produced from proper custody.

4. In *Narbadabai* v. *Mahadeo* I. L. R. 5 Bom. 99 at p. 104 it is suggested that ' strīmatta ' should be taken as one clause meaning ' under female or aphrodisiac influence ', but this is not correct, as Kāt. v. 271 separately mentions ' strī ' and ' matta '.

5. In *Lalubhai* v *Bai Amrit* I. L. R. 2 Bom. 299 at pp. 314--316 the whole of the section on possession is critically examined and differences between the two views of Vijñānes'vara and Nīlakaṇṭha are pointed out.

* P. 30 (text).

Vyāsa declares that possession (in order to be valid evidence) must be characterised by other attributes just as it must be accompanied by title :

> It is desirable that possession (in order to be valid) must have five attributes (lit. parts), viz. it must have title behind it, it must be of long standing, unbroken, free from protest and in the presenee (before the very eye) of the opposite party.

Nārada (p. 62 v. 86) declares that a claim cannot be established by mere possession :

> He who pleads enjoyment alone and no title at all should be considered a thief on account of his (merely) putting forward the deceptive plea of possession (which even a thief can put forward).

*This rule (that mere possession without more is of no avail) only applies to such a period of time during which it is possible to preserve the memory of title, but the same author (Nārada p, 62 v 89) says that mere possession would be valid evidence (with reference to a period of time) of which it is not possible to preserve memory :

> In cases falling within the memory of man it is desirable that posseesion must be accompanied with title in order to be recognised as valid proof of ownership of land. In cases beyond the memory of man possession continued successively for three generations (is valid proof of ownership over land) on account of the absence of certainty (that there is no title).[1]

Anugamābhāvād means 'as the conclusion that there is no title cannot be drawn by means of (the proof, called) non-apprehension (*anupalabdhi*) of what is fit (to be apprehended).[2] Even in the case of possession beyond the memory of man, if there is continuance (or persistence) of memory as to the absence of title (in the person or persons who had possession), the same author (Nārada p. 62 v 87) says :

> That sinful man, however, who enjoys (his possession) without title, even though for several hundred years, should be punished by the king with the fine prescribed for a thief.

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1. Vide pp. 58--59 of the notes to V. M. for detailed explanation of this verse and of *smārta kāla*. According to the Mit. smārta kāla (period of human memory) is said to be one hundred years; accoring to the Smṛticandrikā and Mādhava it is a period of 105 years. Three generations would come to about 100 years. According to some sages, it is a period of sixty years and also three generations. Mandlik's translation (p. 21 ll. 14--17) is loose and does not bring out the technical sense of *anupalabahi*.

2. For detailed explanation of '*anugamābhāvāt*' and *yogyānupalabdhi* vide notes to V. M. pp. 59--60. *Anupalabahi* is the last of six *pramāṇas* according to the Mīmāṁsakas, apart from *pratyakṣa* and inference. In such cases as 'in this place there is no jar' we apprehend the non-existence of the jar by this means of *anupalabdhi*.

* P. 81 (text)

As to what the same author (Nārada p. 63. v. 91) says :

> That which has been enjoyed even unjustly by the father and three ancestors (of a person) cannot be recovered back (from that person) since it has descended successively through three generations,

*it is to be interpreted to mean ' what has been enjoyed by three generations (of the present holder) including the father even without title and even unjustly cannot be recovered back (from the present holder), much less can it be recovered back when it is impossible to conclude that there is absence of title.[1]

As to the text of Hārīta.

> What has been enjoyed by three ancestors without any title whatever cannot be recovered (from the present holder) since it has descended through three generations.

it is to be explained as ' without a title that can be easily perceived and not as without even the semblance (or appearance) of a title.' As for the text of Yājñavalkya (II. 28),

> That man, who first acquired a thing, should prove the source of his title when he is proceeded against; his son or son's son need not (prove title); in their case possession has more weight,

it means that only the first acquirer, if he cannot prove his title, is to be fined (for unlawfully usurping possession) and not his son and grandson; but it does not mean that in their case they succeed in their object (viz. retaining the thing on the ground of possession). Hārīta says to a similar effect :

> That man. however, who first acquires a thing is liable to be fined if he cannot make out a title, and not his son or son's son; but both (the latter) are liable to be deprived (by the court) of the thing possessed like the acquirer himself.[2]

Yājñavalkya (II. 29) says :

> If a person who has been proceeded against dies, his heir (or representative) must establish title (as much as the deceased). In such a case possession without title would not be a (valid) plea.

1. The object of the verse is not to prescribe the impossibility of recovering after three generations what is wrongly seized, but the object of it is to prescribe that possession for more than three generations confers ownership when it is uncertain whether it originated in no title. The words ' for three generations ' stand for *asmūrtakāla* (time beyond human memory).

2. The idea is that the original acquirer is liable to fine if he cannot prove his title. His son and grandson, if they cannot prove title, are not liable to be fined; but if they cannot prove title in their ancestor and in themselves, they are liable to lose the thing they enjoy, since their possession has not ripened into ownership by enjoyment for three generations.

* P. 82 (text).

Rikthī means 'a son and the like who partakes of the heritage'; '*tam*' means 'āgamam' (title). (An objector says) it is inconsistent (or absurd) to say that possession for a long time is proof (of ownership), for it is seen (in the texts) that a claimant loses (his right to a thing), even after possession (by another) for a short time, as is observed by the same author (Yāj. II. 24):

> A person loses land in twenty years when it is enjoyed by another for that period before his eyes and without protest (from him) and chattels in ten years.[1]

*The reply (to the above objection) is : this (verse of Yāj.) is to be construed as laying down that the man loses the profits arising from the land and the like for that period (i. e. 20 or 10 years) when he sees (another enjoy his land or chattels) and yet does not protest (or cause interruption), and not as laying down that he loses also the thing itself, viz. the land and the like (after 20 or 10 years); since (the latter proposition) would be opposed to the text already cited ' he however who enjoys without title &c. ' (Nārada p. 62 v 87). Kātyāyana says :

> The wrongful possessor of cattle, women or males (slaves) or his son should not rely upon (mere) possession (as his support or strong point in case of dispute); this is the rule of law ordained (by the sages).

Nārada (p. 61 v 81) says :

> A pledge (or mortgage), boundaries, a minor's wealth, an open deposit a sealed deposit, women (female slaves), the property of the king (or state) and of a Brāhmaṇa learned in the Vedas : these are not lost (to the owner) by the (long) possession (of another)[2]

Manu (8. 146) says :

> A milch cow, a camel, a riding horse, an animal that is handed over for being broken (or trained); these (and other things) used through the friendship (or assent of the owner) are never lost (to their owner through long possession of another).

Damyaḥ prayujyate means ' which is delivered for being broken.'

Here ends the section on possession.

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1. This verse has been variously interpreted from comparatively ancient times. Medhātithi on Manu (8. 149) gives three interpretations. Nīlakaṇṭha follows the Mit. The plain meaning of the verse is in conflict with the proposition that possession for hundred years is required to create ownership. Therefore the words 'bhumer-hāniḥ. are interpreted to mean ' loss of the profits of the land ' and not ' loss of the land itself'' It is almost certain that at different times and by different sages different periods of adverse possessions were laid down, and the tendency seems to be to bring down the period for adverse possession. Vide notes to V. M. pp. 62--64 for further details.

2. This is almost the same as Manu. 8. 149.

*P. 38 (text)

Now (begins the chapter about) witnesses.

In Toḍarānanda[1] Nārada says (p. 79 v 147):

In doubtful matters when two litigants are disputing, a clear perception (knowledge or conclusion) results from witnesses, since the latter have either seen, heard or experienced the matter in dispute.[2]

*Bṛhaspati (p. 299 vv 1-2) enumerates the kinds of witnesses :

Witnesses are declared (in the smṛtis) to be of twelve sorts, viz. a subscribin witness, one whose name is caused to be written (by another), concealed witness, one who has been reminded, a member of the family, a messenger, one coming by chance (not called on purpose), an indirect witness, one who is confided in by both sides, the king, the (presiding) judge, the people of the village.

Likhitaḥ[3] is one who (whose name) is placed on the document by the plaintiff ; ***lekhitaḥ*** is one who (whose name) is placed (on a deed as a witness) by the defendant at the instance of the plaintiff ; ***gūḍhaḥ*** is one who is made to hear (the transaction between the parties) behind a wall or the like; ***smāritaḥ*** is one who is reminded again and again of the transaction ; ***yādṛcchikaḥ*** is one who having arrived by chance (at the time of the transaction) was made a witness ; ***uttaraḥ*** is one who can depose (to a transaction) over and above the (actual) witnesses because he hears (from them what they had seen) or is made to hear (what the real witnesses themselves heard) ;[4] ***adhyakṣaḥ*** means the presiding judge ; and this word is intended to include the ***sabhyas*** (assessors) and others by reason of the text of Kātyāyana 'the scribe, the judge and the sabhyas in succession (the later one in the absence of the earlier) are (witnesses)'[5]. The same author (vide Bṛhaspati p. 301 vv 16-18) says :

There should be nine, seven, five, four, or only three (witnesses). Two may be accepted as (sufficient) witnesses, if both be ***s'rotriyas*** (learned in the Vedas) ; (but) a single witness should never be asked (examined). Of ***likhita*** (subscribing) and gūḍha (concealed) witnesses, two (each) may be accepted (as sufficient to decide a cause) and of ***lekhita*** or yādṛcchika (chance), ***smārita***, ***kulya*** (those of the same family) and

1. This is an encyclopædia on religious and civil law, astronomy and medicine compiled by Todaramalla, the finance minister of Akbar.

2. The latter clause may also mean ' since they have a direct cognition of the matter by sight or hearing '.

3. For detailed explanations of these terms vide notes to V. M. pp. 65--67.

4. Mandlik (p. 231) translates *uttaraḥ* as (' one in answer) speaking after witnesses, upon hearing or being told (their evidence).' This is far from clear.

5. The other half of this verse as quoted in the Mit. means ' and the king when he himself tries the cause are declared to be witnesses '.

* P. 34 (text)

of *uttara* witnesses there must be three, four or five. A single witness alone would be enough for proof if he be a dūtaka (a messenger), an accountant, one employed in the business (by both parties as their intermediary), the king or the presiding judge.

Yājñavalkya (II. 72) declares that even one witness of the *likhita* and other sorts may be accepted (as sufficient for proof) if both sides consent :

With the consent of both parties even a single person, who knows the *dharma*, becomes (sufficient as) a witness.

Vyāsa says :

Even one witness, whose actions are pure, who knows the *dharma*, whose word is known from experience (to be true), is enough for proof (of a thing), especially in *sāhasa* (offences attended with force such as murder, robbery, rape, &c).

Anubhūtavāk means 'one whose word is generally seen to be true'. Kātyāyana says that one witness, even though not reputed to be a veracious person, is sufficient in cases of deposit and the like;

Even a single person may depose as a witness in the case of a deposit made secretly (in his presence); as regards things borrowed for use even a single person sent by the plaintiff (i. e. the owner of the thing to the borrower with the thing) may be (enough) as a witness.

Yācitam means 'ornaments and the like such as ear-rings brought (from the owner thereof) on the occasion of a marriage or the like'. The same author (Kātyāyana) declares even one person sufficient as a witness in disputes about articles for sale :

That man by whom an article for sale was made (finished or manufactured) should identify it. In a dispute (about that article) he, though alone (as a witness), is declared to be (sufficient) proof.

And Vyāsa declares the qualifications of them (of witnesses);

Those who know the *dharma*, persons having sons, persons born in distinguished[1] families, those who are well-bred, those who (generally) speak the truth, those who perform the rites prescribed in the Vedas and the smṛtis, persons free from hatred and envy, those who are *s'rotriyas* (learned in the Vedas), persons who do not depend upon others, who are learned, who do not travel from place to place and those who are in the prime of life should be made witnesses by the wise in disputes about debts and the like.

1. The word *maulāḥ* is rendered thus by the Kalpataru and the Vīramitrodaya. Madanaratna explains 'those who know the preceding circumstances of the transaction in dispute).' Medhātithi (on Manu 8. 62) explains *maulāḥ* also as 'those who are residents of the same place as the parties'.

*P. 35 (text)

* Nārada (p. 81 v 155) says :

(In disputes) among *s'reṇīs* (guilds) the office-bearers (or heads) of the s'reṇis, among groups or associations[1] the heads thereof, among those who stay outside (the village, i.e. who are untouchables) persons who live outside, and (in disputes) among women, women become (proper) witnesses.

Kātyāyana speaks of members of associations (*vargas*) :

Persons wearing marks peculiar to their sects (such as Bauddhas), s'reṇis (guilds), *pūgas* and other communities of merchants and all others who are banded into a group (or association) : these are called *vargas* by Bhṛgu. The leaders (or heads) of *dāsas* (serfs), *cāraṇas* (bards), wrestlers, of those who subsist (by driving or riding) elephants, horses and chariots and of groups of every sort are known (in the *smṛtis*) to be *vargins*.

Yājñavalkya (II.69) speaks of persons of other castes (as eligible witnesses):

It should be known that witnesses (in a cause) ought to be at least three; they should be devoted to performing the rites prescribed in tha Vedas and *smṛtis* ; (they should be) of the same caste and the same varṇa (class) as that of the litigants or men of all castes may be allowed (as witnesses) for all castes.

The same author (Yaj. II.70-71) mentions those who are to be excluded (as witnesses) :

A woman, a minor (under 16 years), an old man (above 80), a gambler, one intoxicated, one possessed, a person reputed to be guilty of a deadly sin, an actor, an unbeliever (or heretic), a forger (of deeds or coins), a deformed person, one degraded from caste (for some sin or wrong-doing), one interested (in a party to the suit), one interested in the subject matter (of dispute), a friend (or associate), an enemy, a thief, an adventurer (or desperado), one known to be a liar, one deserted and the like are not (competent) witnesses.

Nirdhūtaḥ means ' one abandoned by his kinsmen (or friends)' ; the word *ādi* (the like) includes slaves and others. Bṛhaspati (p.302 v 29) says :

The mother's father, the father's brother, the wife's brother, the maternal uncle, the brother, a friend and son-in-law : these are not (competent) witnesses in all disputes.

$Nārada (p 83 v 161) says :

He, who not being named (cited) as a witness, comes of his own accord and deposes, is termed in the s'āstras a volunteer (witness). He does not deserve to be a witness.

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1. For s'reṇi, vide above p. 5 n 1. The word 'varga' means ' a group or association in general ' and is of wider import than *śreṇi*. It may apply to any association or group of people banded together for some purpose.

*P. 36 (text) $ P. 37 (text)

Kātyāyana says :[1]

If one of the subscribing witnesses that are cited by a disputant deposes against the others, all of them become no witnesses [2](i.e. become useless or incompetent).

Nārada (p 89 v 188) declares that even such (persons as are above declared to be incompetent witnesses) are in certain cases allowable as proper witnesses :

Those even, who have been mentioned (in verses 178-187 of Nārada's ṛṇādāna chapter) as incompetent witnesses such as slaves, impostors and the like, become (competent) witnesses, having regard to the gravity of the matter (in dispute).

In the case of the absence (of competent witnesses) Manu (8.70) says :

In the absence (of competent witnesses) evidence may be given even by a woman, by a minor, by an old man, by a pupil or kinsman, by a slave or hired servant.

Yājñavalkya (II. 72) says :

In (charges of) adultery, theft, assault and slander and in all offences attended with force (such as manslaughter) any person may be a witness.

In this passage, [3] although adultery and the like fall under the category of *sāhasa*, they are separately mentioned in order to refer to such adultery and other offences as are clandestinely committed. Us'anas says :

A slave, a blind man, a deaf person, a leper, a woman, a minor, an old man and the like : even these are regarded as (competent) witnesses in *sāhasa* (offences due to force), when they are not concerned (in the matter to be tried).

**Anabhisambaddhāḥ* means ' when they are not partial (to one side)'.

Bṛhaspati (p. 302 v 24) says :

A litigant may point out faults in the witnesses cited (by the opponent) to prove the matter in dispute, if the faults really exist. A litigant attributing faultsto witnesses who are faultless is liable to pay a fine equal (to the matter in dispute).[4]

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1. The word *likhitānām* and *nirdiṣṭānām* may also mean 'that are put down as witnesses in the plaint or reply ' and ' are cited as witnesses at the time of proof (*kriyā*).'

2. Vide notes to V. M. p. 70 for detailed explanation. This rule of Kātyāyana was to apply only where the witnesses that give conflicting testimony were equal in number or equal in merit. Compare Nārada (ṛṇādāna 160). Vide notes to Kāt. v, 359.

3. Compare a similar remark above p. 3.

4. This would apply only where it is possible to set a money value on the subject matter of dispute. Hence Aparārka and Vir. explain it as meaning 'the fine imposed on a false witness

*P. 38 (text).

In this passage the word **vādī** (litigant) means ' the defendant '; **tatsamam** means 'equal to the amount which is the subject of dispute.' Vyāsa says :

> The faults of the witnesses should be stated by the defendant before the court. They (the witnesses) should be made (by the judge) and the assessors to refute all the faults put down in writing (against them).

The meaning is that the witnesses should be required by the **sabhyas** (assessors) to give their explanation with regard to their faults as witnesses written down on paper. The same author (Vyāsa says) :

> If (the witnesses)[1] admit (the faults pointed out in them), they do not at all deserve to be witnesses: if it be otherwise (i. e. if the faults are not admitted), they (the faults) should be established by the defendant with evidence. If the defendant cannot clearly establish (the faults urged by him) against the witnesses he should be made to pay a fine. When the witnesses (cited by the plaintiff) are proved (to possess the faults pointed out by the defendant), they are to be rejected, being devoid of the characteristics of (competent) witnesses. (The plaintiff) should be made to pay a fine in the same way (as the defendant, when the latter fails to prove the faults alleged) according to the procedure laid down in the **s'āstra**, if the plaintiff, who relies solely on the goodness of his witnesses (in whom faults are established), does not care for other means of proof.

Atonyathā means ' if not admitted; ' **bhāvanīyāḥ** means ' should be made to admit ' (their faults); **kriyayā** means ' by evidence. ' The connection of the words is ' not establishing (the faults) clearly ' (i. e. **sphuṭam** is to be connected with **abhāvayan**). As to the text

> Those faults of witnesses that are (obvious) to the members of the court or that follow from the ordinary experience of the world should be considered (by the members of the court of their own accord). Such faults should not be required to be established, since (such witnesses) should be excluded (by the court) on account of their (patent) faults[2]

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1. Mandlik (p. 25) translates this as ' in the answer of admission witnesses are never fit to be called '. This is wrong. It has already been stated that in an answer of admission no evidence is necessary. The author is now on the subject of faults of witnesses. The explanation of ' atonyathā bhāvanīyāḥ ' that follows makes it clear that the translation should be as above.

2. This verse is ascribed to Vyāsa by Aparāka, Sm. C. and Vir., while Parās'ara-Mādhavīya ascribes it to Kātyāyana. Vide notes to V. M. pp. 72--73 for various readings and detailed explanation. Even with the reading ' sabhāsadām dūsaṇam ' it is possible to translate as above, the literal meaning being ' what apears to be a patent fault of the members &c. '. The word *doṣavarjanāt* may also mean ' in order that the fault called *anavasthā* may be avoided '. If witnesses were called to prove defects in witnesses other witnesses might be cited to prove the former set to be false and the process might have to be carried on ad infinitum.

*it has reference to (faults in) trustworthy witnesses that (faults) can be ascertained from ordinary experience of the world. When the defendant has no knowledge of the faults (of the witnesses of the plaintiff) the same author says ;

> Those faults of evidence (witnesses and documents) that are latent should be declared by him who disputes (the evidence) at the (proper) time and the patent faults should be declared by the members of the court (*sabhyas*) at the proper time after exhibiting what the *s'āstra* (the works on law) dictates.[1]

The meaning is that latent (concealed) faults should be exposed by expounding (by reference to or reliance on) the s'āstra before the (actual) examination of the witnesses. And Bṛhaspati (p. 302 v 250) says that they (the latent faults) should not be exposed after that (stage) :

> Whatever faults in (or objections to) a document or a witness there may be must be declared at the time when the trial is proceeding, but the (litigant) should not (be allowed to) declare the faults after they (the witnesses) have deposed.

Uktān means 'when they have said,' i.e. when they have begun to speak.[2]

The termination of the past passive participle (*kta* in Pāṇini's terminology) is added (here in *uktān*) in the active sense according to the rule[3] 'the affix *kta* (i. e. *ta*) is added to a root to denote the completion of the first of a series of continuous acts and in the active voice.' Kātyāyana declares the punishment in this matter. :

> He, who, after a matter has been deposed to, would find fault with (raise objections to) witnesses in whom hef ound no fault before and cannot give (adequate) reasons for that for not pointing out the faults earlier shall be mulcted in the lowest amercement.[4]

If the witnesses be themselves unable to refute the objections raised against them, the party (whose witnesses they are) must do it ; so says Bṛhaspati (p. 302 v. 26.) :

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1. The proper time for pointing out the faults of witnesses by litigants is when the hearing begins and for the judge and the assessors when the judgment is being pronounced. The *śāstras* (smṛtis) lay down rules as to circumstances that vitiate oral and written testimony.

2. Mandlik translates (p. 26) *uktān* as ' the speaker beginning to speak (should be stopped); this is the meaning'. This is quite wrong. Vide notes to V. M. p. 74. The word 'uktān' (which is a past passive participle) would naturally be connected with ' doṣān ' in the preceding half, but then the sentence hardly makes any sense. Hence ' uktān ' is explained as an active past participle and connected with ' witnesses '.

3. This is Pāṇini III. 4. 71. Vide notes to V. M. p. 74.

4. According to Manu 8. 138, the lowest amercement was 250 *paṇas*, the middling was 500 and the highest was 1000.

*P. 30 (text).

He, whose documents or witnesses are found fault with in a suit, will not succeed in his cause, as long as he has not cleared that (the document or the witness of the faults pointed out).

Tat (in the verse above) signifies 'a document and the rest'. Kātyāyana prescribes the punishment for those who adduce false witnesses:

*He, who, through a desire to succeed in his cause, cites false witnesses, should be deprived of all his belongings and should be then made to lose the subject matter (of dispute).[1]

Nirviṣayam means 'deprived of the property that is the subject matter of dispute'. Nārada (p. 90 vv. 193–196) declares the means for ascertaining false witnesses:

He, who, on account (of the consciousness of) his own wrong-doing (guilt in perjuring himself), appears like one uneasy, shifts from place to place (when giving evidence), runs after every one (he sees), who suddenly coughs much, again and again breathes deeply, who scratches the ground with his feet, who shakes his arms and garment, whose face changes colour and whose forehead perspires, whose lips become dry, who looks above and sideways, who without being asked talks much and irrelevantly as if he were in a hurry, should be known as a false witness. (The king) should punish such a sinful one severely'.

Kātyāyana and also Manu (8. 87, 79-80) state the manner of putting questions to witnesses :

The judge, himself being pure, should ask in the forenoon the witnesses of the regenerate classes who are pure to depose to the truth, with their faces turned to the east or north, in the presence of (an image of) the divinity and Brāhmaṇas. $The judge should in a soothing tone question the witnesses in the court-room and in the presence of the plaintiff and the defendant in the following manner; 'All that you know concerning the reciprocal actions of these two ' (litigants) in this matter depose truthfully, for you are in this matter the witnesses.

In disputes about kine, horses and the like the same author (Kātyāyana) declares the (necessity of) the presence of the subject-matter of dispute (at the trial);

In the presence of the plaintiff and the defendant and of the subject matter of the suit (the judge) should urge (require) the witnesses to give evidence to their face and never behind their back. (Evidence) may in rare cases be taken in the vicinity of the subject-matter (of dispute)

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1. *Tataḥ* may mean 'on account of that fault' and *nirviṣayam* according to the Smṛticandrikā means 'banished from the country '.

* P. 40 (text). $ P. 41 (text).

even in the absence of both (the litigants). This rule holds good in (disputes about) quadrupeds, bipeds and immoveable property. In all disputes about articles that are weighed (like gold) or that are counted or measured, (the judge) may require the witnesses to depose even in the absence (of the subject matter of dispute*), but not in other cases.

Tayorapi vinā kvacit–this means 'even in the absence of them both' i. e of the plaintiff and the defendant,[1] but in the presence of the subject of dispute in some cases? i. e. in the case of quadrupeds and the like; ***taulyam*** means 'gold and the like that are capable of being weighed'; ***gaṇimam*** means 'coins and the like that can be counted out'; ***meyam*** means 'rice wheat and the like which can be measured'; ***abhāvepi*** means 'even in the absence of the subject matter of suit'; ***kriyākāreṣu*** means 'in judicial proceedings'. The same authority (Kātyāyana) says that in disputes relating to homicide the deposition of witnesses should be taken in the presence of (an image or temple of) S'iva:

> In the case of the killing of living beings, (the judge) should make the witnesses depose in the presence, of S'iva, when no trace (or remnant) of the death is left; otherwise (i. e. when traces exist), a witness should not be made to depose thus (i. e. in the temple of S'iva).[2]

Tat* means 'the deposition of a witness.' It should be taken (in the presence of S'iva) in the absence of any marks of the homicide; ***anyathā* (otherwise) means 'when there are marks of the killing.' The same author (Kātyāyana) says:

> The king should not cause procrastination in recording the deposition of witnesses. Great sin, viz. failure in performing one's duty, results from procrastination.

Nārada (p. 91 v 198) says:

> Having summoned the witnesses and having bound them firmly by oaths, (the judge) should separately question all the witnesses whose character (conduct) is well-known and who are familiar with the matter in dispute.

1. Vir. explains this as Nīlakaṇṭaha does. But the Smṛticandrikā and Parāsa'ramādhavīya explain differently viz. 'even apart from the two places (evidence may be taken)'. The two places where witnesses may depose are the court and in the case of immoveables near the property itself. Evidence in the case of homicide may be taken at the place of crime.

2. This is a somewhat difficult verse. Some digests read 'in the presence of the dead body' (*śava* for *S'iva*). This latter seems to be a better reading. Nīlakaṇṭha's way of taking *tat* as referring to deposition and connecting *abhāve* with *cinhasya* is far-fetched. He had to resort to it as he read '*śiva-sannidhau*'. Vide notes to V. M. p. 75 for details.

* 42 (text)

Vasiṣṭha says :[1]

What was seen by the (witnesses) together should be deposed to by them in the same way (i. e. they should depose simultaneously); but (what was seen) by the witnesses separately should be related by each separately. Where a matter has become known to witnesses at different times (the judge) should make them depose one by one. This is the rule (of examining witnesses) laid down (in the s'āstras).

Manu (8. 113, 102) says :

A[2] ***Brāhmaṇa*** should be made to swear by (his) truth, a ***Kṣatriya*** by his riding animal and weapons, a ***Vais'ya*** by his kine, grain and gold, a ***S'ūdra*** by (invoking on his head) all the sins (in case he deposed falsely). Brāhmaṇas who tend herds of kine, who are traders, mechanics or actors, who are hired servants or money lenders, should be treated as S'ūdras (for purposes of examination as witnesses). Those[3] who are fallen from their proper duties, who subsist upon food given by others and yet who desire the status of a man of the regenerate classes should be treated like S'ūdras.

*The meaning (of ***satyena***) is : if you speak falsely, thy (merit due to) truth will perish; such like should be the mode (of oath for a Brāhmaṇa). The test for determining the (truth or falsehood of the) deposition of a witness is declared thus :

If (what a witness) deposes is not less than (what is affirmed by the party citing him) in respect of place, time, age, the substance (***dravya***), the name, the caste, the measure, (the judge) should declare that the matter in dispute has been proved (by that party).

Yājñavalkya (II. 78) lays down a rule for decision when witnesses contradict each other.

In case of contradiction the testimony of the majority should be accepted (i. e. prevails); if (the witnesses) are equally divided, the testimony of the virtuous set and if there be a conflict (of testimony) among virtuous witnesses, the testimony of the most virtuous should be accepted.

The same author (Yāj. II. 76) prescribes the fine for not deposing after having agreed to give evidence :

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1. These two verses are ascribed to Kātyāyana by Aparārka. These verses are not found in the printed Vasiṣṭhadharmas'āsatra (B. S. series) nor in its translation (S. B. E. vol. XIV).

2. This verse occurs in Nārada also (ṛṇādāna 199).

3. This verse is not found in Manu.

*P. 49 (text)

A person not giving evidence should be made by the king to pay the whole debt together with a tenth (part) added thereto on the forty-sixth day (after he is summoned).

Sarvam (the whole) means ' including the interest '; ***sadas'abandhakam*** means ' together with a tenth part.' The Mitākṣarā states that the tenth part is to be taken by the king and the debt together with interest is to be taken by the creditor. The same author (Yāj. II. 82) lays down the punishment for one who, having knowledge (of the matter in dispute), does not agree to give evidence as a witness :

He, who, having been called upon (along with others) to give evidence as a witness conceals it from others under the influence of folly, should be made to pay an eight-fold fine; if (he be) a brāhmaṇa he should be expelled.[1]

Such a witness is to be fined eight times as much as ths fine inflicted in case of losing the suit. But a ***brāhmaṇa*** unable to pay the fine is to be expelled from the country and a ***kṣatriya*** and the like are to be made to do acts proper for them (or to which they are accustomed). So says the Mitākṣarā. Manu (8. 108) says :

That witness who after giving evidence is seen to meet with (the misfortunes of) disease, fire or a relative's death within seven days (of his deposition) should be made to pay the debt and a fine.

*Yājñavalkya (II. 80) says:

If even after some witnesses have deposed (as to a matter in dispute) other witnesses more meritorious (than those already examined) or double in number (of those already examined) depose to the contrary, then the witnesses first examined are false ones.[2]

Nārada (p. 21 v. 62) says ;

[3]After a judicial proceeding has been almost finished, proof, whether documents or witnesses, would be useless, unless the same had been announced before.[4]

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1. The Mit. on Yaj. shows that this verse rather applies to a person, who, having agreed to give evidence and being cited along with others to depose, afterwards at the trial denies to other witnesses that he is a witness. It is Yaj. II. 77 that is the proper verse to be cited for the purpose of laying down a punishment for him, who, though he knows the matter in dispute, does not agree to come forward as a witness.

2. Vide notes to V. M. pp. 77--78 for explanation. This can only apply to a case where judgment has not already been pronounced, as the next verse of Nārada makes clear.

3. Mandlik (p. 29), Dr. Jolly (S. B. E. vol. 33 p. 21 note) and Gharpure (p. 41) translate '*nirṇikta*' by the word 'decided'. But this is wrong. *nirṇikta* does not mean '*nirṇīta*'. It literally means 'cleansed thoroughly' i. e. heard completely, but not finally decided. Besides that interpretation would be opposed to the rules about review of judgment. Vide notes to V. M. pp. 79--80.

4. Compare C. Pro. Code Order 7 rule 14 (2) and 18.

* P. 44) text)

Yājñavalkya (II. 83) states that in some cases witnesses may depose falsely and declares the penance therefor :

Where a man of the four castes would be liable to suffer death (if the truth were told), there a witness may depose falsely; for purification from that (sin of falsehood) an oblation of cooked rice should be offered to Sarasvatı by the regenerate classes.[1]

Viṣṇu (8. 17) prescribes the penance for a śūdra (deposing falsely) 'a śūrad should give one day's fodder for ten cows.' *Aikāhikam* means 'as much as would be sufficient to feed them one day.'

Here ends the section on witnesses.

Now begins the section on ordeals $

That (an ordeal) determines a matter which cannot be decided by means of human proof. It is of two kinds according as it determines at once or after some time. Bṛhaspati (p. 315 vv 45) mentions the varieties of the first kind of ordeal ;

*Balance, fire, water, poison, kośa (sacred libation of water) as the fifth, the sixth is declared to be rice, seventh is a hot piece of gold, the eighth is the ploughshare and the ninth is known as springing from *dharma*.

Yājñavalkya (II. 95) declares that the first five are to be resorted to only in cases where the matter charged is of great value or is of a serious nature :

These ordeals, viz. balance, fire, water, poison, kośa are meant for clearing (persons) of serious charges (or in valuable matters), when the complainant (or plaintiff) declares himself ready to undergo fine (following on a defeat in the trial by ordeal).

S'īrṣakasthe[2] means 'who undergoes the fine consequent upon defeat.'

Pitāmaha says :

(The judge) should prescribe the balance and the other (four) ordeals for those who are proceeded against (or complained against) with assurance. The ordeal of grains of rice and kos'a (ordeal) are to be employed in cases of doubt (as to whether the defendant is the person who committed the wrong).

1. Sarasvatī being the goddess of speech it was appropriate that an offering should be made to her for deposing falsely. Compare Manu 8. 105.

2. The word 'S'īrṣakasthe' is thus explained. *S'īrṣam* means the head i. e. the fourth stage of a judicial proceeding (viz. the final judgment). It therefore indicates fine which is imposed on the defeated party. Therefore the word means 'one who offer to undergo the fine of defeat'.

* P. 45 (text). $ Both Stokes and Mandlik omit the treatment of ordeals.

Avaṣṭambhaḥ means 'certainty.' Therefore the kos'a ordeal can be employed in a charge made with certainty about the wrong-doer and also in one where there is a doubt. The Kālikāpurāṇa says:

> In charges of adultery, of theft, of intercourse with women who are forbidden, when one is accused of having committed a mortal sin and in cases of serious (or violent) offences against the king ordeals may be employed. In serious charges (of adultery etc.), in civil wrongs (such as non-payment of debt) and in cases where there is reviling, the king should prescribe ordeals with an undertaking (on the part of the complainant or plaintiff) to pay a fine (in case of opponent's success in the ordeal). In grave charges such as that of adultery and in cases where there are many accusers (or plaintiffs) an ordeal may be prescribed in order that (the person accused) may clear himself (of the accusation), but without an undertaking (by the accuser) to pay a fine (in case of opponent's success in the ordeal).

Agamyāḥ (in the first verse from the Kālikā-purāṇa) means 'women other than others' wives, such as prostitutes and the like that are common (to all who visit them)'[1]; the word *s'aste* means the same thing as 'abhiśaste' (i. e. charged with the commission of a great sin); *sāhasam* means 'a wrong done with violence (or force)'; *avarṇaḥ* means 'abuse'; *s'iraḥ* means 'fine'. *The attribute (adultery with) another's wife (to the word abhiśāpa) is not literally intended, since what is intended to be repeated (or mentioned) as a topic (about which something is to be predicated) is *abhis'āpa* (grave charge)[2]; similarly the words 'where there are many etc.' also (are not to be literally understood). Therefore even in the absence of individual complainants an ordeal may be resorted to in the case of all charges (of mortal sins). The mention of the purpose in the words *s'uddhikāraṇāt* (for the purpose of clearing one's character) can also be well construed on this interpretation and also the following general proposition (can be well understood or construed):

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1. This is a somewhat unusual sense of *agamyāḥ*. That word generally refers to such women as are forbidden for sexual intercourse (on the ground of its being incest).

2. Here Nīlakaṇṭha refers to a Pūrvamīmāṁsā principle (which follows from Jaimini III. 1. 13--15). Vide notes to V. M. pp. 83--84. The conclusion of Jaimini is that though the Vedic sentence 'he cleanses the *graha* (cup)' uses only the singular *graha*, yet all cups are to be cleansed i. e. the singular number is not strictly intended and stands for the plural also. In the same way, the word '*paradārābhiśāpa* has already occurred in the first verse, it is again repeated in the third verse, where the proposition to be laid down (the *vidheya*) is that an ordeal may be resorted to for clearing one's character. The subject of which this is predicated is really *abhiśāpa* (a grave charge) and not '*paradārābhiśāpa*'; the word *paradāra* being only an attribute of abhis'āpa may be taken to include other *abhiśāpas* also, just as the singular number includes the plural. So also even if there be not many accusers or even none, an ordeal may be resorted to for clearing one's character.

* P. 46 (text)

An ordeal) may be resorted to in cases of sedition and in (grave) sins[1] (Yāj. II. 96.).

Nārada says:

An ordeal without an undertaking to pay a fine may be prescribed for those who are suspected by kings (as offenders), who are pointed out by thieves (as their associates) and who are intent on clearing themselves.

An oath is divine proof which determines a cause after a time. Nārada (p. 100 vv. 248 and 250 for first verse and last half) enumerates its varieties:

Truth[2], riding animals and weapons, kine, grains and gold, the feet of a deity and one's father (or ancestors), one's gifts and meritorious actions (these may be sworn by). One may (solemnly) touch the head of one's sons, wife or friends (by way of oath) or in charges of all kinds (whether serious or trivial) the drinking of *kos'a* (sacred water) may be prescribed. These are proclaimed by Manu as oaths (to be resorted to) in trifling matters.

Kos'a, though it determines (a dispute) after the lapse of time, was enumerated among the first series (i. e among tulā &c. above that decide a matter immediately), since it can be resorted to in serious charges also. Yājñavalkya (II. 96) says:

One of the two may undergo (the ordeal) if he likes, while the other may undertake to pay the fine (in case of defeat by ordeal).

*This option can apply only if the complainant (or plaintiff) so desires, but if he be unwilling, ordeals are to be prescribed for the accused (or defendant)[3] alone, according to the ***dictum*** of Kātyāyana quoted in the Divya-tattva[4]:

No one should ask the plaintiff or complainant to undergo ordeal; those who are adepts in ordeals should offer ordeals to him who is the defendant (or accused).

Now (begins) the treatment of (the topic of) those who are fit (to undergo ordeals). Yājñvalkya (II. 98.) says:

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1. Yaj. uses the general word *pātaka* and not *paradārābhiśāpa* (which is a particular sin) when prescribing an ordeal without fine; hence in the Kālikāpurāṇa also the word *paradārābhiśāpa* is merely illustrative and includes other grave sins also (like *brahmahatyā*).

2. With the first verse, compare Manu. 8. 113 'Satyena &c.' cited above. Truth is to be taken with Brāhmaṇas, riding animals and weapons with Kṣatriyas, kine &c with Vais'yas. Any one may swear by the feet of his ancestors or of a deity. The verse 'he may touch &c.' does not occur in the printed Nārada. Compare Manu 8. 114.

3. The general rule as stated by Kātyāyana above was that the complainant (or plaintiff) was not to undergo a *divya*, but that it was the accused or defendant who was to do so. But if the complainant chose he could himself undergo the ordeal and the defendant or accused may then undertake to pay the fine.

4. This is one of the works of Raghunandana.

* P. 47 (text)

The (ordeal of) balance (is prescribed) for women, minors, old men, the blind, the decrepit, brāhmaṇas and the diseased, fire or water (ordeal) is prescribed for (Kṣatriya and Vais'ya respectively) and for s'ūdra seven *yavas* of poison.

Strī means (any woman) without reference to caste, age or any particular condition ; *bāla* means 'a person of the age of sixteen and also of any caste' ; an old man is one who is beyond eighty years of age. Balance alone out of the several ordeals is prescribed for a brāhmaṇa at times which are common to all divyas as detailed later [1] ; but when it is the proper time for fire and other ordeals, they also can be administered (to brāhmaṇas). It is hence that Pitāmaha says :

Clearing off (from guilt) by means of the ordeal of *kos'a* is prescribed for all the (four) *varṇas* (principal castes). All these (nine ordeals) are proper for all persons, but not poison (ordeal) for a brāhmaṇa.

The Kālikā-purāṇa says :

For the last of the *varṇas* [2] (i. e. for the s'ūdra) should be offered (the ordeal of) the heated golden *māṣa*.

Nārada (p. 101 v. 255 and p. 113 vv. 313-315 for last four verses) says :

(The judge) should always examine by (the ordeal of) balance eunuchs, those devoid of courage (or mettle), those whose minds are in distress on all sides, minors, old men, diseased persons and women. *Poison is not prescribed (as an ordeal) for women nor water ; (the judge) should consider the hidden truth about them by means of the balance, the *kos'a* and the like. Clearing (of guilt) by water is not prescribed for those who are diseased (or distressed) nor poison for those who suffer from biliousness ; the ordeal of fire is not prescribed for those who suffer from white leprosy, who are blind and who have bad nails. Women and minors are not to be plunged (in water as an ordeal) by those who know dharmas'āstra, and also those who are diseased, old or weak. (The judge) should not plunge in water those who are devoid of energy, who are ground by disease and those who are distressed ; if they plunge in water they might die at once, since they are known to have little vitality ; these should never be plunged in water (as an ordeal), though they come (before the court) charged with heinous crimes, nor should (the judge) cause them to carry fire (as ordeal) nor should he clear them with poison.

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115. Vide the verse of Pitāmaha quoted below 'Caitra...... these are the months common &c'.

116. According to the Vīr. 'varṇāntya' means 'one who borders on the varṇas' i. e a Mleccha.

* P. 48 (text)

Viṣṇu (Viṣṇu Dh. S. 9. 29.) says:

Water should not be prescribed for the phlegmatic, for the diseased, for timid people, for those who suffer from difficulty in breathing and from *cough* [1].

Kātyāyana says;

Fire is not (prescribed) for those who work in iron (blacksmiths), nor water for fishermen nor should poison be ever offered (as ordeal) to those who know magic spells and *yoga*. (The judge) should not prescribe the ordeal of rice for one who is observing a vow or one who suffers from a mouth disease.

* *Vratī* means 'one who observes the vow of subsisting on milk and the like.'

Pitāmaha says:

Kos'a should not be offered by the wise to those addicted to wine and women, to gamblers and to those who are unbelievers (atheists).

Nārada (p. 117 v. 332) says:

The offering of *kos'a* (as an ordeal) should be avoided as regards him who has once been found guilty of a grave crime, who is destitute of *dharma*, who is ungrateful, who is impotent or who always finds faults, who is an atheist and who is sinful (or in whom faults exist).

Kātyāyana says:

The determination (of disputes) among the untouchables, among the lowest people, among slaves, among mlecchas who are evil-doers and among those who are born of unions in the reverse order of castes (i. e. unions of females of higher castes with males of lower castes) should not be carried out by the king (in his court); on occasions (of dispute among them) he should direct them to undergo ordeals well-known among them.

Tatprasiddhāni means ' balance, serpent and the like.' If the person who should undergo an ordeal is unable to do so, the same author (Kātyāyana (as quoted in the Divyatattva says:

(The king or judge) should prescribe the proper (ordeal) without conflict with the time or the place. In case of inability (lit. accident, reverse of fortune) ordeal should be carried out through a substitute. This is the rule (of law).

Anyena hārayet mean ' the ordeal should be performed by a substitute;' *viparyaye* means 'when the person to undergo the ordeal is unable to do

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1. This is not in the original a verse but a prose sūtra, while Nīlakaṇṭha's reading makes it a verse. Viṣṇu reads ' na s'leṣmavyādhyarditānām bhīrūṇām...codakam ',

*P. 49 (text)

so'. (The judge) should prescribe the proper (ordeal). When it is positively known that a person at one time was guilty of patricide or of some mortal sin and subsequently (he is charged with another crime) and it is doubtful (whether he committed it), even in such case the same author (Kātyāyana) says that an ordeal must be performed by such a person through a substitute alone :

* In case of those who are guilty of killing their mother, father, a *brāhmaṇa*, a teacher (or elder relative), an old man, a woman, and a minor; particulary in the case of those who are guilty of committing one of the great sins and who are atheists; in the case of those who wear heretical sect marks ; in the case of lascivious women and of those who are experts in magic spells and *yogic* practices; in the case of those who are born of the mixture (or confusion) of castes and those who are habitual sinners; when these people are charged again with those very reprehensible crimes, the king who is devoted to *dharma* should take care not to prescribe an ordeal for them (to be undergone in their own persons). (The king) should prescribe an ordeal to be undergone by worthy persons appointed by these very (sinners). Where worthy persons cannot be found (willing to undergo an ordeal for them) they should be cleared by their own people (i. e. relatives should undergo the ordeal for them).[1]

Svakaiḥ means 'by their relatives'.

Now as to the time (for an ordeal). Pitāmaha says:

Caitra, Mārgas'iras and Vais'ākha, these are months common (to all ordeals) and not contrary to them. The balance (ordeal) is declared to be (proper) for all seasons but it should be avoided when the wind is blowing. The fire (ordeal) is declared to be proper in the seasons of *s'is'ira*, *hemanta* and *varṣā* (rain). Water (ordeal) is proper for *s'arad* (autumn) and *grīṣma* (summer) and poison in *hemanta* and *s'is'ira* (i. e. December to March).

The express mention of *hemanta* and *s'is'ira* for the poison ordeal serves to indicate other seasons also (i. e. it is merely illustrative and not exhaustive), since it will be declared below ' in the rainy season, the quantity (of poison, to be administered in ordeal) is only four *yavas* ' (Nārada p. 115 v. 324). Nārada says :

Kos'a (ordeal) may be offered at any time and the balance also at all seasons.

1. The verse does not absolutely prohibit the prescribing of an ordeal for these men; what is forbidden is that they are not to undergo an ordeal in their own persons, but through a substitute appointed by them.

*P. 50 (text).

*Pitāmaha says :

Examination by fire (ordeal) should be made in the forenoon and the balance also in the forenoon.[1] Water should be offered in the noon by one who desires to secure the truth about ***dharma***. Purification by ***kos'a*** is prescribed for the first part of the day (forenoon), but poison should be given at night in the last watch, (as then it is) very cool.

Respectable people say that these ordeals should be resorted to on Sunday.[2]

Now as to the place (of ordeals). Pitāmaha says :

The balance should always be placed facing the east and motionless in a purified place, either in a famous temple of some God (such as Indra)[3], or in the court-hall, at the royal gate or in a public square.

Nārada (p. 104 v. 265) says :

In the court room, at the royal gate and in the square of a temple (ordeal should be performed).

Kātyāyana says ;

In the case of those men who are accused of the great sins, (the ordeal) should be performed in ***indrasthāna*** (place where Indra's banner is worshipped or some holy shrine) and at the royal gate in the case of those who are guilty of treason (or sedition). Ordeal should be offered in the public square to those who are born of unions in the reverse order of castes (i. e. unions of males of lower castes with women of higher castes). The wise declare that in matters other than these (ordeals should be performed) in the midst of the court hall.

Nārada says :

When ordeals are administered at an improper time and place and are undergone by the litigants outside (the village, i. e. away from the public gaze) they always fail (to be decisive) as to the matters in dispute ; there is no doubt about this.[4]

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1. According to the Mit. the day of twelve hours is to be divided into three parts, the first part of four hours being called *pūrvāhṇa* (forenoon), the second *madhyāhna* (noon) and the third *aparāhṇa* (afternoon).

2. Vide Mit. on Yaj. II. 97.

3. The word ' Indrasthāne ' is explained 'as some well-known temple ' by the Smṛticandrikā, while the Divyatattva explains it as 'the place where the banner festival in honour of Indra is held.' This last festival, where a banner in honour of Indra was worshipped, continued from the 8th to the 12th day of the bright half of Bhādrapada. Vide Bṛhatsaṁhitā chap. 43.

4. Dr. Jolly (S. B. E. vol. 33 p. 250) is not right in translating the last half as ' they constitute a deviation from the proper course of a law suit '. The Smṛticandrikā and Parās'ara-Mādhavīya say ' if the proper place and the like are disregarded, the ordeal loses its validity; this is declared in the words *adeśakāla* '. &c.

* P. 51 (text)

*Now (begins) the procedure of the rites common to all ordeals.

Pitāmaha says:

The judge, knowing the *dharma*, should, after turning to the east and folding his hands, utter the following words and invoke the gods in the manner following; ' come, come, oh revered *dharma*, and sit down (for decision) in this ordeal together with the guardians of the worlds[1], and the (eight) Vasus, the (twelve) Ādityas and the bands of Maruts. Having invoked *dharma* to be present in the balance, he should afterwards assign (proper places) to the subordinate (deities).[2] The same author (Pitāmaha) says:

Having placed Indra in the east, Yama in the south, Varuṇa in the west and Kubera in the north, he should assign Agni and the other guardians of the worlds to the intermediate points (south-east, south-west &c.). Indra is yellow, Yama dark, Varuṇa of the lustre of crystal, Kubera has a golden complexion and so has Agni. So also Nirṛti is dark and Vāyu is said to be smoke-coloured; Īs'āna is red. (The judge) should contemplate upon these deities in these forms in order. The wise (judge) should invoke the Vasus to the southern side of Indra. Dhara Dhruva, Soma, Āpaḥ, Anila, Nala, Pratyūṣa Prabhāsa--these are enumerated as the eight Vasus. The place of the Ādityas is between that of Indra and that of Īs'āna (i.e. between the east and the north-east). Dhātṛi, Aryaman, Mitra, Varuṇa, Aṁs'a, Bhaga, Indra,$ Vivasvat, Pūṣan, Parjanya as the tenth, then Tvaṣṭṛ, then Viṣṇu, though born last, not the least (but the highest of the twelve Ādityās) ; these are the tweve Ādityas enumerated by name.. To the west of Agni is known the place of the Rudras. Vīrabhadra, S'ambhu, high famed Giris'a, Ajaikapād, Ahirbudhnya, Pinākin, Aparājita, Bhuvanādhis'vara, Kapālin the lord of people, Sthāṇu, and the great Bhava--these are known to be the eleven Rudras. (The judge) should assign a place for the Mātṛs between Yama and the evil spirit (Nirṛti i. e. between south and south-west). Brāhmī, Māhes'varī, Kaumārī, Vaiṣṇavī, Vārāhī, Māhendrī, Cāmuṇḍā together with her attendants (these are the seven mātṛs). The place of Gaṇes'a is known to be the north of Nirṛti and the place of the Maruts is said to be to the north of Varuṇa. Gaganaspars'ana, Vāyu, Anila, Māruta, Prāṇa, Prāṇes'a, and Jīva-- these are declared to be the seven Mārutas. The wise (judge) should invoke Durgā to the north of the balance. These deities are to be worshipped after taking their respective names. ‡Having offered worship to Dharma beginning with

1. For the Lokapālas vide Manu 5. 96.

2. Dharma is the principal deity to be invoked in ordeals and the other deities from Indra to Durgā (as detailed in the following verses) are subsidiary.

*P. 52 (text). $ P. 53 (text). ‡ P. 54 (text).

arghya[1] and ending with ornaments in due order, he (the judge) should then get ready for the subsidiary deities the worship beginning with *arghya* and ending with ornaments and should offer (to *dharma* and the subsidiary deities) the service beginning with sandalwood and ending with *naivedya*.[2] He (the judge) should light fires in the four principal quarters and offer oblations at the hands of persons versed in the Vedas of clarified butter, *havis* (boiled rice) and fuel sticks that are the materials of *homa*. He should perform *homa* with the (sacred) Gāyatrī, *praṇava* (the sacred syllable *om*) and add *svāhā* at the end.

Havis means '*caru*'.[3] The revered Mīmāṁsaka from the Gauḍa country (viz. Raghunandana) says in his Divyatattva that clarified butter, boiled rice and fuel sticks are to be offered to the same deities (*dharma* as principal and the rest as subsidiary); they are to be thrown on to the fire together (and not separately) as in the case of the *sānnāyya* offerings.[4] But this is not correct. In this case it is impossible to have a single joint performance (*tantratā*); as the means of offering (the three substances) are different viz. the *sruva* ladle is (the proper means) of offering *ājya* as said in the sentence 'he (the priest) divides with the *sruva*', the *sruc* is (the proper means) of offering *caru* (boiled rice) as follows from the *sūtra* of Ās'valāyana [5] and the like to the effect 'he covers once (with ghee the *juhū* ladle)', 'he divides off two portions of the boiled rice from the middle and the part of it to the east,' 'he sprinkles ghee over the boiled rice and over the portion divided off,' 'this is the characteristic procedure for all *avadānas* (offerings)'; and as the hand is the proper means for offering fuel sticks on account of its fitness. In the case of the *sānnāyya* offerings (curds and milk), a single joint performance (offering of the two materials together) is proper, as the *juhū* (ladle) is the means of offering both. The same author (Pitāmaha) says:

> Having written down on a leaf (paper) the subject-matter for which the defendant (or accused) is proceeded against, the leaf should be placed on the head (of the person undergoing the ordeal) together with the following *mantra*.

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1. Arghya is water offered by way of honour.

2. This is some eatable, such as raw-sugar &c.

3. Vide notes to V. M. p. 89 for explanation of *caru*.

4. Vide notes to V.M.p.90 for sānnāyya and the proposition of Raghunandana explained in detail. Sānnāyya is a name given to a mixture of curds and milk offered to Indra or Mahendra. As the deity is the same they are offered together. Therefore Raghunandana argues that the three substances *ājya*, *havis* and *samidh* should be offered together. For detailed exposition of this complicated passage and of *sruva*, *sruc*, *juhū*, *sāmarthya* and *tantra* vide notes to V. M. pp. 91--93.

5. Compare Ās'valāyanagṛhyasūtra I, 10. 18 and I. 7. 10--12 for the passages referred to here.

*The *mantra* is (Mahābhārata, Ādiparva 74. 30):

The sun,[1] the moon, the wind, fire, heaven and earth, waters, the heart, Yama, day and night, the two twilights and dharma know (see or mark) the doings of men.

Nārada says :

The judge, being a brāhmaṇa, who is versed in the Vedas and the Vedāṅgas (subsidiary lores such as grammar, phonetics, astronomy, ritual, metrics, etymology), endowed with learning and character, with an unruffled heart, free from malice, whose word is true, who is pure and viglilant, who is intent upon doing good to all creatures, who has fasted, who wears wet garments, who has brushed his teeth, and who has performed the worship of all deities according to the prescribed rules (should administer ordeals).

Yājñavalkya (II. 97) says :

(The judge), having summoned at sunrise (the person who is to undergo ordeal), who has bathed and wears wet garments, who has observed a fast (the previous day), should administer all ordeals in the presence of the king and the brāhmaṇas.

Pitāmaha also says :

Ordeals should always be administered to persons who have fasted either one night or three nights, who are purified and whose garments are wet.

The same author (Pitāmaha) says :

The king surrounded by good men should esteem this (mode of) purification and should please sacrificial priests, family priests and preceptors with gifts. The king who causes this to be done, after enjoying sweet pleasures, secures great fame and becomes fit for absorption into *Brahma*.

Here ends the section on ordeals.

$ Now (begin) the rules for the balance (ordeal).

Pitāmaha says :

The king should cause to be constructed a balance-shed, broad, high and white-washed, sitting wherein (the person undergoing ordeal) would not be within reach of dogs, cāṇḍālas and crows; it should have doors and contain grains (rice &c.), should be guarded by servants, should have drinking water and the like and should not be untenanted.

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1. Compare Manu 8. 86 for a similar verse.

*P. 55 (text). $ P. 56 (text).

Nārada (p. 103 v 264) says :

(The timber employed) should be of the *Khadira* tree, but not the white variety and should not be worm-eaten.

S'uklavarjitam means ' excluding the white *Khadira*.'

(The timber) should be blackwood, or in its absence teak but without hollows, or Añjana, the inner part of Tindukī, Tinis'a or red sandalwood.

But Mādhava reads ' (the timber should be) of Arjuna, Tilaka, Aśoka Tiniśa and red sandalwood.'

The king (or judge) should select such trees as these for making a balance (Nārada p. 104 *v 265).

Evam-vidhāni means according to Madana ' these and other sacrificial (sacred) trees also such as Udumbara.' Hence Pitāmaha says :

Having bowed to the guardians of the worlds, and having cut down the sacrificial tree (Khadira), the balance should be prepared by the wise, after reciting the *mantra* as in the case of (making) a sacrificial post ; *and *mantras* addressed to Soma[1] and Vanaspati should be muttered in a low voice when the tree is cut.

Yūpavat means after reciting the *mantra* ' Oh, herb, save this sacrificer (Vāj. S. IV. I.). As the mantras addressed to Soma and Vanaspati are to be muttered and have an unseen result, they are both to be repeated (i. e. there is no option).[2] The *saumya mantras* are well known. The *Vānaspatya mantra* is ' Oh Vanaspati (tree), may you grow with a hundred branches' (Ṛgveda III. 8. 11).' The line ' mantraḥ saumyo vānaspatyaḥ' &c.) merely reiterates what already follows from the extended application (*atides'a*) contained in the word ' yūpavad'.[3] Pitāmaha says :

The (beam of) the balance was to be four cubits (in length) and the two supports (of the beam from which the balance was suspended) were to be of the same length (above ground) ; the distance between the two supports was to be two cubits or a cubit and a half.

Vyāsa says :

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1. Ṛgveda I. 91 is a hymn of 23 verses which are all addressed to Soma. The saumya *mantra* may either be ' somo dhenum ' (I. 91. 20) or ' āpyāyasva sametu' (I. 91. 16).

2. This is based on the Pūrvamīmāṁsā XII. 4. 1, for an explanation of which vide notes to V. M. p. 94.

3. The *mantra* 'vanaspate' is recited when a tree is cut for making a *yūpa*. So when it is said that a sacred tree is to be cut with recitation of mantras as in the case of *yūpa*, it is not necessary to say expressly that the *mantra* ' vanaspate ' should be uttered in a low voice. But the verse does expressly say so. It therefore does not lay down anything new, but only repeats what is already known. Atides'a is a principle in the Pūrvamīmāṁsā. Anuvāda is a variety of Arthavāda and is opposed to *vidhi*.

* P. 57 (text).

The two supports (or columns) were to be implanted in the ground for two cubits.

Pitāmaha says :

The balance (i. e. its beam) should be a square (log), firm, and straight and three (iron rings) should be fastened on to it with care.

The same author (Pitāmaha) says :

After suspending from the two ends (of the beam of the balance) two pans, he (the judge) should arrange on both the pans *darbha* grass with their points turned towards the east. In the pan to the west he should have the person (undergoing ordeal) weighed and in the other pure earth, not mixed with bricks, ashes, stones, broken pieces of vessels or bones.

*Nārada (pp. 105-106 vv 271-72) says :

Having firmly suspended two pans from the two books attached to (the two ends of the beam of the) balance, he should have the person (undergoing ordeal) weighed in one pan and gravel (or stones) in the other. He (the judge) should have the person (undergoing ordeal) held in (the pan on) the northern side and stones on the southern ; he should have the basket (pan) filled with bricks, dust, and lumps of earth.[1]

The same author (Nārada p. 252 vv 27-28) lays down the mode of examining (a person by balance ordeal) :

The exminers should bring the balance on the same level with the two pendants [2] (hanging down from the two arches), and (a little) water should be poured over the upper part of the (beam of the) balance by clever men. That balance was to be known tas *sama* (perfectly horizontal) on which the water so poured would not run down.

Pitāmaha describes the (suspending of) two pendants for (ascertaining the) horizontal position (of the beam) :

Two arches should also be raised on both sides of the beam. They should always be ten *aṅgulas* higher than the balance. Two pendants should be suspended hanging down from the arches, tied with a string, and made of clay and touching the upper surface of the (beam of the) balance.

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1. Reading this verse with Pitāmaha's it follows that bricks, dust and stones are not totally forbidden as material for weighing the man against. What is forbidden is the mixing together of all these. One may fill the pan either with earth or stones or bricks, but not with all together.

2. As said by Pitāmaha below, two arches were to be erected on two sides of the balance. in which the pans were to move. They were to be ten *aṅgulas* higher than the balance and from the arches two pendants of clay were to be suspended by a thread and the beam was to be kept in such a position that its ends touched both the pendants.

* P. 58, (text).

Pitāmaha says :

Having first weighed the man (to be tried by ordeal) and having made him get down from it, the balance being always adorned with banners and pennons, (the judge) knowing the *mantras* should then invoke the deities in the manner described (above) to the accompaniment of the beating of musical instruments and drums and with sandalwood paste, flowers and unguents.

*Nārada (p. 252 v 29) says :

He (the judge) should first worship the balance with red sandal-wood paste, red flowers, with curds, cakes and husked grains of rice mixed with red powder and then he should honour the respectable people (assembled there).

Yājñavalkya (2. 100-102) says :

When the person complained against sitting in (one pan of the) balance is equal (in weight) to the things (clay &c.) against which he is weighed, a line (with chalk) should be drawn (on the arch showing the position of the pans) by those who are experts in handling the balance and the person being made to get down from the pan should invoke the balance in the following words: ' Oh balance, you are the abode of truth, you were formerly created by the gods (for this purpose); therefore, beneficent one, declare the truth, and free me from this (cloud of) suspicion. Mother, if I am a sinner, then take me lower; if I am pure, carry me upwards.'

Nārada (p. 106 v 276) says :

Having put him under (spiritual) restraint by exhortations (about the results of untruth), the judge should again place him (in the balance) after putting upon his head a writing (about the matter in dispute) when the wind is not blowing and there is no rain.

Samayaiḥ parigṛhya mean ' having restrained with oaths. ' Viṣṇu (Viṣṇu Dh. S. 10. 9) describes the oaths :

Those (hellish) worlds which fall to the lot of those who kill brāhmaṇas and of those who are false witnesses will be yours, if you hold the balance falsely.

Nārada (p. 107 vv 278-279 ; Viṣṇu Dh. S. 10. 10-11) mentions that at the time of again sitting in tha pan there is to be an invocation :

‡You know the evil and meritorious deeds of all beings. You alone know, oh god, what mortals do not know. This man accused of a wrong in this judicial proceeding is weighed in you. Therefore you will be

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*P. 59 (text). ‡ P. 60 (text).

pleased to save, according to the dictates of dharma, him who is now under suspicion. You surpass in truth gods, demons and mortals; oh lord, your word is true in making clear what is pure and sinful. The sun, the moon (the same verse as above at p. 50),

Pitāmaha says :

A worthy brāhmaṇa proficient in astronomy should examine the time. The time of five *vināḍīs* [1] should be calculated by those who are experts in measuring the time of examination by ordeals. The king should appoint as superintendents (over the calculation of time), worthy brāhmaṇas who speak out as they see, who are learned, pure, not covetous.

All the superintendents (the brāhmaṇas) declare to the king the purification (by ordeal) or otherwise.

Vināḍyaḥ means *'palas'*, in accordance with the *smṛti*

The period required for (repeating) ten long letters is called prāṇa and vināḍikā is equal to six prāṇas.

Nārada (p. 207 v. 283) says :

If the person weighed in the balance is seen to go up (i. e. to be lighter than what he formerly weighed), there is no doubt that he is innocent; but a man who weighs the same or goes down (i. e. weighs more) would not be innocent.

Vṛddhi means 'going up'; *hāni* means 'going down'. Pitāmaha says :

The man whose guilt is light weighs the same, while he whose guilt is great goes down (weighs more).

*Guilt is (said to be) light when the offence is the first one and not done of set purpose; but where by the very words of the writing put on the head (of the person weighed) it is ascertained that it was a first offence and committed without set purpose and where the only question was whether he was a guilty person, if after undergoing the ordeal he weighs the same, the ordeal has again to be gone through, since it is impossible (in such a case) to infer (from the fact of the same weight in both cases) that the guilt was light. Hence Bṛhaspati (p. 317 v. 19.) says:

He who weighs the same as before should be weighed again and he who goes up (weighs less) becomes victorious.

Kātyāyana mentions other reasons for again going through the ordeal :

The person should be again weighed when the scales snap or the (beam of the) balance breaks or the rope gives way and when there is a doubt about the innocence (of the man).

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1. A *vināḍī* (or pala) is equal to the time spent in reciting 60 long syllables, 60 Vināḍīs make a Nāḍī or Ghaṭikā; the person was kept in the balance for five Vināḍīs.

* P. 61 (text)

Vāysa says :

> When the pan breaks, or when the beam of the balance or the two hooks break, when the ropes give way or the transverse beam (or the support) gives way, the king should then again resort to purification (by the same ordeal).

But this applies to cases where the breaking is due to some visible cause; when however the breaking is purely accidental, (the person undergoing ordeal) is certainly guilty, as declared in another *smṛti*

> When the pans or the beam of the balance or the hooks or the ropes or the transverse beam breaks, the king should declare the guilt (of the man weighed).

Kakṣa means 'the bottom of the scales'; *akṣa* means 'the support of the balance placed across the columns'. The older writers (or eastern writers) say that only the weighing is to be repeated and not the whole procedure; but Madana says that the whole procedure is to be repeated (at the time of the second weighing) because the defect (in the act of purification by ordeal) is not removed in this way (by mere repetition of the weighing).[1]

*Now (begins) the procedurs of the rites (of the balance ordeal). The person, who is to perform the ordeal, should on an auspicious day in the morning approach one of the trees referred to above, should cut the tree with the *mantra* 'oh herb, save this person' (Vāj. S. 4. 1.), should mutter (the *mantra*) ' somo dhenum ' (Ṛg. I. 91. 20) (of which) Gautama (is the sage), Soma (the deity), Triṣṭubh (is the metre) and (which) is employed in *japa* (muttering of prayers) and the *mantra* 'Oh tree, (grow) with a hundred branches ' (Ṛg. III. 8. 11.) of which Gāthina Vis'vāmitra, *vanaspati*, *triṣṭubh* (are respectively the sage, the deity and the metre) and which is employed in *japa*. After having bowed to the *lokapālas* viz. Indra and the rest one by one, he should erect a balance, (with a beam) four cubits long, of the thickness of four *aṅgulas*, having four faces, rounded in the middle and at the ends and (with a diameter) of four *aṅgulas*, having in the middle on its upper surface and at the two ends but on their lower surface three hooks or rings. Then some say that he should construct a place seven or five cubits square raised (from the ground) to the extent of four *aṅgulas*. Then on that (raised) spot or on any other purified place two square pillars six cubits long should be driven into the ground to the extent of two cubits, having pared tops beyond the length of six cubits (on which the transverse beam was to be placed from which the whole balance was to be suspended). Above the ground four cubits (of the

1. The view of Madana is in accordance with the Kātyāyana-s'rauta-sūtra I. 7. 28. It is not clear what view Nīlakaṇṭha himself holds. He merely places the two views in juxtaposition. But from the fact that he places Madana's view last and since he generally follows the Madanaratna it may be inferred that he held the latter view.

* P. 62 (text)

pillars) plus the portion of the pared tops thereof (were to remain). The distance between the pillars was to be two cubits or one cubit and a half. On those two tops was to be placed (transversely) a beam having in its middle but on the lower surface a support in the form of an iron hook, ring or catch for holding the (beam of the) balance. From that (transverse) beam (on the pillars) was to be suspended the beam of the balance by means of the hook or catch on the upper part of it. At the end of the beam of the balance were to be tied two pans by means of three ropes each. To the east of the balance two posts at a distance of two cubits were to be fixed into the ground towards the north and south and over them is to be placed a log* with its inside outwards. This is to be the ***toraṇa*** (outer frame, arch). And it should be higher by ten aṅgulas than the balance frame. A similar one should be erected also to the west (of the balance). Two spherical pendants of clay should be tied with a string, suspended from the (two sides of the) frame-work and made to touch the ends of the (beam of the) balance in order to ascertain the horizontal position (of the beam). On the two pans should be spread kuśa grass with their ends turned eastward. Then on a Sunday the judge who has observed a fast for a day should place in the western pan the person to be cleared (of his guilt by ordeal) who has taken a bath along with his garments after sunrise, who has observed a fast for a day or for three days in case of ability to do so and in charges of grave sins; he (the judge) should then put in the pan to the east stones, bricks, clay or the like and so weigh that the two pans stand even. Truthful ***brāhmaṇas*** and goldsmiths should examine this (viz. the equipoise of the balance) by means of sprinkling water (on the beam of the balance). Then in order to make sure of the position (of the pan in which the person sat) reached at the time of the weighing (by the pan in relation to the toraṇa) the judge should draw a line (on the toraṇa with chalk &c,) and should make the person (undergoing ordeal) get down (from the pan). Then the person to be cleared, having named the time and the place and having declared his intention in the words 'I shall perform such and such an ordeal in order to proclaim my innocence', should present clothes and and the like to the judge and four priests. The revered smārta-bhaṭṭācarya (i. e. Raghunandana) says that ***svastivācana*** [1] and the like should also be performed. And the judge with folded hands and to the accompaniment of the beating of drums should invoke ***dharma*** (to be present) in the balance in the following manner.

> ***Om***, come, come, revered ***dharma***, and enter this ordeal together with the ***Lokapālas***, ***Vasus***, ***Ādityas*** and tribes of Maruts.

He should then invoke the subsidiary deities. The verse 'Indraṁ viśvā' (Ṛg. I. 11. 1. of which) Mādhucchandasa, Indra and Anuṣṭubh (are the

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1. This consists in the person addressing to the priests 'may you say the word svasti' and the priests saying 'Om svasti.' Vide notes to V. M. p. 101.

* P. 63 (text)

sage, deity and metre respectively) is employed in invoking Indra. In the same manner is to be understood the employment (of the following *mantras*) everywhere. Having invoked Indra towards the east (of the balance) by *mantra* 'all (increase might of) Indra' (Ṛg. I. 11. 1) (and with the words) 'Indra, come here and stay here', he (the judge) should contemplate upon Indra as yellow. '*Yamāya somam*' (of which) Yama, Yama and Anuṣṭubh* (are respectively the sage, the deity and metre).[1] Having invoked Yama to the south with the *mantra* 'for Yama (strain) the soma' (Ṛg. X. 14. 13.) and with the words 'Yama, come here and stāy here,' he should contemplate upon the dark Yama. 'Tvam no Vāmadevo Varuṇas–Triṣṭubh'. Having invoked Varuṇa to the west with the *mantra* ' O Agni, remove from us', (Ṛg. IV. 1. 4.) and with the words 'come here, Varuṇa, and stay here,' he should contemplate upon Varuṇa who is of the lustre of crystal. Having invoked Kubera to the north with the *Yajus* formula ' to the over-lord of kings' (Tai. Ā. I. 31. 127, Mysore ed.) and with the words ' Come here, Kubera, and stay here', he should contemplate upon Kubera of the golden complexion. ' Agnim Medhātithir - Agnir Gāyatrī'. Having invoked Agni to the south-east with the *mantra* ' we choose Agni as (our) messenger ' (Ṛg. I. 12. 1.) and with the words ' Come here, Agni, stay here' he should contemplate Agni of the golden colour. 'Mo ṣu ṇo Ghoraḥ Kaṇvo Nirṛtir-Gāyatrī'. Having invoked (Nirṛti) with the *mantra* 'may not kill us' (Ṛg. I. 38. 6.) and with the words 'here &c.', he should contemplate upon the dark (Nirṛti). 'Tava Vāyovyas'vo Vāyur-Gāyatrī'. (Having invoked) as in the preceding cases (Vāyu) with the *mantra* 'O wind, your protection' (Ṛg. VIII. 26. 21.) and (with the words) 'here' &c., he should contemplate upon the smoke-coloured (Vāyu). 'Tam-is'ānam Gautama Is'āno Jagatī'. Having invoked (Is'āna) with the *mantra* 'we invoke that lord' (Ṛg. I. 89. 5.) and with the words 'here &c.' he should contemplate upon the ruddy (Is'āno). To the south (of the place where) Indra was invoked 'jmayā atra vasavo Maitrāvaruṇo Vasiṣ'ṭho Vasavas - Triṣṭup'. Having invoked the eight *Vasus* with the *mantra* 'O Vasus, here on this earth' (Ṛg. VII. 39. 3.) and with the words 'come here, stay here', (he should) contemplate upon them.

¶Dhara, Dhruva (this verse occurs above p. 48). 'Tyān-nu Sāmmado Matsyo dvādas'ādityā Gāyatrī'. Having invoked between Indra and Is'āna, the twelve Ādityas with the *mantra* 'indeed those kṣatriyas' (Ṛg. VIII. 67. 1.) (he should contemplate on them). Dhātā, Aryamā (these two verses are translated above p. 48).

'Ā Rudrāsaḥ s'yāvās'va ekādas'a rudrā jagatī.' To the west of Agni having invoked the Rudras with the *mantra* ' O Rudras, come' (Ṛg. V. 57. 1) and with the words ' here ' (he should contemplate &c.).

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1. In each of the following cases, before the actual *mantra* is cited, we have the pratīkas of the *mantra* (the first words for recognising it), its *ṛṣi* (sage), its *devatā* (deity) and metre. The translation therefore does not set out all these details in brackets hereafter.
* P. 64 (text). ¶ P. 65 (text).

Virabhadra, S'ambhu (these two verses occur above p. 49).

' Brahma jajñānam Gautamo Vāmadevo Brahmā Triṣṭup. ' Having invoked Brahmā between Yama and Nirṛti with the ***mantra*** ' when prayer was being born' (Vāj. S. 13. 3) and with words ' here ' (he should contemplate etc.). Of the ***mantra*** ' Gaurir-mimāya,' Dirghatamas, Umā and Jagatī (are the sage, deity and metre). Having invoked the Mothers with the ***mantra*** ' Gaurir-mimāya ' (Ṛg. I. 164. 41) and with the words, ' come here, mothers, stay here,' (he should &c.).

Brāhmi, Māhes'vari (vide p. 48 above).

*' Gaṇānām tvā Gṛtsamado Gaṇādhipatir-jagatī. ' To the north of Nirṛti having invoked Ganeṣa with the ***mantra*** '(we invoke) thee, lord of groups' (Ṛg. II. 23. 1) and with the words ' here &c. ' (he should &c.). ' Maruto yasya Rāhūgaṇo Maruto Gāyatrī. ' To the north of Varuṇa having invoked the Maruts with the ***mantra*** ' in whose house, Oh Maruts' (Ṛg. I. 86.1) and with the words ' here ' (he should &c.).

Gaganaspars'ana, Vāyu (vide p. 49 above).

' Jātavedase Kas'yapo Durgā Triṣṭup '. To the north of the balance, having invoked Durgā with the ***mantra*** ' for (Agni) Jātavedas ' (Ṛg. I. 99. 1) and with the words ' here ' (he should &c.). Having thus invoked these deities he should worship them. In accordance with the details of ceremonial worship beginning with the words ' *Om*, I offer water by way of honour to ***dharma***, salutation to him,' he (the judge) should offer to ***dharma*** water by way of honour (***arghya***), water for washing the feet, water for sipping (ācamanīya), ***madhuparka***, water for sipping, water for bathing, clothes, the sacred thread, water for sipping, and ornaments such as coronet, armlet and the like as the last item (of worship). He should then offer to Indra and the other (subsidiary) deities in their respective names (uttered) in the dative case and preceded by the syllable ' *om* ' and followed by the word ' namaḥ ' the items of worship from ***arghya*** (water by way of honour) to ornaments according to appropriateness (and not all promiscuously to all).[1] He should then offer to ***dharma*** sandalwood paste, flowers, incense, lamp, naivedya (some eatable by way of offering) and curds, cakes and holy grains of rice and should offer to Indra and the rest sandalwood paste

1. We saw above that in an ordeal *dharma* is the principal deity and Indra and the rest are subsidiary ones. The items when offered to Indra will appear in the form ' Om Indrāya arghyam prakalpayāmi namaḥ. ' The word ' padārthānusamayena ' (according to appropriateness of the items to the persons to whom they are to be offered) is opposed to ' Kāṇḍānusamayena. ' The idea is that as ornaments are more appropriate to females, they are to be offered to Durgā alone and not to Indra and the rest, but *arghya*, *pādya* &c. are to be offered to all from Indra to Durgā. Vide notes pp. 101-102 for further explanation The reference is to Jaimini V. 2. 1-3 and Pārthasārathi thereon.

* P. 66. (text).

and the rest as before (i. e. according to appropriateness). The sandalwood paste and the flowers to be employed in the balance ordeal and in the worship of ***dharma*** should be red, but those for the worship of Indra and the rest may be (red) if available (or of any other colour). The judge is to perform the whole procedure of the ceremonial up to this stage. Then, after kindling domestic fire in the four directions by means of four sacrificial priests ***homa*** (burnt offering) should be performed. *In doing that, having first uttered the sacred ***Gāyatrī*** together with '***om***' and having uttered the syllable '*om*' with '***svāhā***' at the end, the priests should throw into the fire for ***savitṛ*** (the Sun) 108 times each offerings of clarified butter, boiled rice and fuel sticks. Then the person complained against should write on a leaf (or paper) the matter charged against him and also the following ***mantra*** : The sun, the moon (this occurs above p. 50). Then the leaf (or paper) should be placed on the head of the person complained against who is to be cleared (of guilt). All these details beginning with the invocation of ***dharma*** and ending with the placing of the writing on the head are common (the same) for all ordeals. Then the judge should recite (the following) ***mantra*** before the balance by way of exhortation :

> Oh balance (***dhaṭa***), thou wert created by Brahmā for the purpose of testing those who are wicked. Thou art named ***dhaṭa***, thou, being ***dharma*** as the letter "***dha***" shows, detectest, when held (as a balance), the crooked man, as the letter ***ṭa*** (contained in the word ***dhaṭa***) indicates.[1] Thou knowest the evil and meritorious deeds of all beings which mortals do not know ; thou alone knowest every thing. This man charged (of a wrong) in this judicial proceeding desires to be cleared of it , therefore thou wilt please save him from the suspicion according to (the dictates of) righteousness.

Then the person charged should recite the following ***mantra*** before the balance (Yāj. II. 101-2) :

> Oh balance, thou art the abode of truth ; thou wert created by the gods in times of yore. Therefore speak out, auspicious one, the truth and free me from suspicion. ¶If, mother, I be a sinner, then carry me downwards ; if I be innocent, raise me high up.

Then the judge should have the accused person, who has the writing on his head, placed in the balance occupying the same place (i. e. pan) and the same position (relatively to the toraṇa), and should keep him there in the same condition for five ***palas*** (i. e. two minutes). At the

1. This gives a fanciful etymology of the word *dhaṭa*.

P. 67 (text). ¶ P. 68 (text).

time the innocence or guilt should be examined by pure brāhmaṇas and should be communicated to the king and the *sabhyas* (members of the court). Then the (person charged) should get down from it (the balance) and should please the judge, the brāhmaṇas and the priests with fees (*dakṣiṇā*) according to his means. Then having taken leave of the deities with the *mantra* 'arise, Oh Brahmaṇaspati' (Ṛg. I. 40. 1) and with the words 'may the tribes of gods depart', he should hand over everything to the judge.

Now (begins) the method of the fire (ordeal.) *

Pitāmaha says :

> I shall proclaim the method of fire (ordeal) as laid down by the *s'āstras*. He should prepare eight *maṇḍalas* and a ninth in front (or to the east of them). Those who know the vedas declare that the first *maṇḍala* (circle) is that of Agni, the second of Varuṇa, the third of the god Vāyu, the fourth of god Yama, the fifth of Indra, the sixth of Kubera, the seventh of Soma, the eighth of Savitṛ (the Sun) and the ninth of all the gods.

Madana,[1] however, read (the passage) as 'the eighth is of all the gods while the ninth that is to their east is a large one and belongs to the Earth. The maṇḍalas should be constructed with cowdung and should be sprinkled with water'. The same author (Pitāmaha) declares the extent of the circles (Nārada p. 109. vv. 285-286) :

> The distance of one circle from (the beginning of) another is declared to be thirty two *angulas*. In this way the eight circles would come up to two hundred *angulas* plus fifty-six. This is the way in which the ground is to be divided.

The word 'maṇḍalāt' means 'from the beginning of a circle'. The meaning is that the ground covered by one circle and by the space intervening (between it and the next circle) would together come up to thirty-two *angulas*. Here each circle is to be of sixteen *angulas* (finger-breadth) and the space between two circles is also to be the same, as Yājñavalkya says (II. 106) :

> A circle is to be known to be sixteen *angulas* (in extent) and the intervening space was to be the same.

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1. For Madana, the author of the encyclopædic work on dharma called Madanaratna, vide my History of Dharmas'āstra pp. 389-393. He flourished between 1350-1460 A.D. P. 69 (text).

If the foot of the person to be cleared be more than sixteen *angulas* in length, * then the intervening space (between two circles) would be less than sixteen *angulas*; if the foot of the person to be cleared be less than sixteen *angulas*, then inside the circle of sixteen *angulas* another circle of the length (i. e. diameter) of his own foot should be drawn. As to what Nārada reads after the words ' in this way two hundred *angulas* ', viz. 'forty more of the ground calculated in *angulas*' (Nārada 4. 286), that has to be interpreted as leaving out of calculation that part of the ground that is covered by the space intervening between the eighth and ninth circles, as (that space) was not to be traversed (by the person performing the ordeal). Similarly the reading of Kalpataru [1] '(plus) twenty-four (*angulas*) is declared to be the allotment of ground' has to be interpreted as stating the extent of *angulas* after omitting (from calculation) the first circle in which (the person undergoing the ordeal) has to stand.

> In each circle are to be placed *kus'as* as laid down by the s'āstras and the settled rule is that the person performing the ordeal should plant his foot on them.

In the Mitākṣarā and the Madanaratna (we read) 'he should offer into fire ghee 108 times as a propitiatory rite' and Vijñānes'vara says that this *homa* should be accompanied with the *mantra* 'agnaye pāvakāya svāhā' (oblation to fire, the purifier). Nārada says (p. 109. vv. 288-289) :

> A person who is a blacksmith by very birth (caste), who is clever in kindling fire and who has seen the procedure (of fire ordeal) on other occasions should heat in fire a ball of iron till it becomes red hot and emits sparks and should guard it (from profane touch).

Pitāmaha says :

> He should heat in fire on all sides an iron ball of eight *angulas* and weighing fifty *palas* [2] having made it even and without edges.

† The Kālikāpurāṇa says :

> The king should give to the person charged a rounded iron piece weighing fifty *palas* and twelve *angulas* long and blown redhot.

S'aṅkha-likhita declare that the (iron) ball is to weigh sixteen *palas* 'or having held in his folded hands an (iron) ball of sixteen *palas*, covered

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1. This oft-quoted work was composed by Lakṣmīdhara under the Kanoj ruler Govindacandra (1104-1155 A. D.). Vide History of Dharmas'āstra pp. 315-318.

2. Each *pala* weighed 320 *gunjas* according to the Līlāvatī. Vide notes to V. M p. 104. According to Raghunandana, 20 *palas* were equal to 66 *tolas*, five *māṣas* and four *gunjas* and 12 guñjas were equal to one māṣa and eight *māṣas* equal to one *tola*. Vide notes to V. M. p. 111.

* P. 70 (text). † P. 71 (text).

with seven as'vattha (fig tree) leaves and made red-hot'. This holds good when (the person undergoing the ordeal) is weak (and not able to carry a heavy ball of 50 *palas*). The iron ball is to be heated thrice, as declared by Nārada (p. 109 v. 290.) 'when heated by the third heating'. Having first heated it and then plunged it into water, having again heated it and plunged it in water, when it is being heated again (a third time), the judge should perform (all the details described above) beginning with the invocation of fire and ending with placing the writing on the head (of the person performing the ordeal). Here Pitāmaha declares a special rule as to the worship of fire :

> The king should cause the worship of fire to be made with red sandal, red incense and red flowers.

Hārīta says :

> (He) should stand facing the east stretching out the fingers of his hand, with wet garments, pure and with the leaf (or writing) placed on his head.

The word 's'odhya' (the person to be cleared of guilt by ordeal) is to be understood here. Pitāmaha says :

> He should stand in the first circle facing the east, with folded hands and purified.

*Nārada (p. 110 v. 301.) says :

> He should make red marks on all sores of the hands (of the person undergoing ordeal) and should examine them again (after the ordeal) to see whether they (the hands) are marked with the identical dots.

Yājñavalkya (II. 103) says :

> Having marked the hands of the person on which grains of rice have been rubbed he should cover them (the hands) with seven leaves of the as'vattha (fig) tree and should fasten round them as many threads (i. e. seven).

Vijñānes'vara holds that the word '*tāvat*' is an adverb and that the meaning is that he should pass the thread (round the leaves) seven times ; while Madana holds that the meaning is that he should pass round (the leaves) only once a string of seven threads, the word *tāvatsūtra* (being a single compound word and) meaning 'a bundle of as many threads (as seven).' Pitāmaha says :

> He should place on the hands (of the person to be cleared) seven Pippala leaves, auspicious grains of rice, flowers and curds and there is also to be a fastening of threads round (all).

* P. 72 (text). Haṁsapāda (or-pada) means 'hiṅgulaka' (vermilion).

The *mantras* to be recited by the judge here before the fire in the iron ball as invocation will be declared in (the section on) the procedure of the rites. Yājñavalkya (II. 104-105) says :

> Oh fire, the purifier, thou movest within all beings ; wise one, declare like a witness the truth about me from out of sin or righteousness. When he (the person performing ordeal) has uttered these words, (the judge) should place in both his hands the iron ball that weighs fifty *palas*, that is even (without edges) and that glows red.

Pitāmaha says:

> The king who is devoted to *dharma* or (the judge) appointed by him taking hold of it (the red-hot iron ball) with a pair of tongs should place it in his hands.

*Nārada (compare p. 110 v. 296) says :

> He (the person undergoing ordeal), being urged on by the judge and holding in both his hands that (the red-hot ball), should stand in one circle and then walk straight over the other seven circles (so that he then reaches the eighth).

Pitāmaha says :

> He should not walk hurriedly, but should go slowly and at ease. He should not pass over circles nor should he plant his foot in the intervening space (i. e. he must plant his foot in such a way as to exactly cover the diameter of each circle). Having reached the eighth circle, the wise man (who performs the ordeal) should throw (the red-hot ball) in the 9th circle.

The (red-hot iron) ball is to be cast in the ninth circle covered with grass, as the Kālikāpurāṇa says :

> He should go over seven circles measuring sixteen fingers each with like intervals (between the circles); having gone (to the eighth) he should throw (the ball) on green grass.

Pitāmaha says :—

> Then (the judge) should throw (rub) on the hands (of the person performing ordeal) grains of rice or barley; when his hands are rubbed with them without any hesitation and show no change (or injury) at the end of the day, (the judge) should declare him to be innocent (or to have succeeded in the ordeal).

Kātyāyana says :—

> If the person charged loses his footing or suffers burns elsewhere than in the proper place (i. e. on other parts of the body, not on the hands),

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*P. 73 (text).

the gods declare that that is not a (real) burn (i. e. not a blemish in the man); he should be again made to undergo the ordeal.

* Yājñavalkya (II. 107) says:

If the (redhot iron) falls earlier (i. e. before reaching the eighth circle) or when there is a doubt (whether his hands are injured or not), he should again carry the (redhot) ball.

Now (begins) the procedure (in sequence of the ceremonial of the ordeal of fire). On the previous day the ground should be purified and the next day nine circles should be drawn. But of them the first should be of sixteen ***angulas*** (in diameter) and in front of it ground measuring thirty-two ***angulas*** should be divided into two parts in the second of which the second circle should be made of the same extent (diameter) as the foot of the person who is to walk (over the circles); the remaining will be the space (between the first circle and the second). Having in the same way made the circles from the third to the eighth together with the spaces intervening between them, a space of sixteen ***angulas*** should be left in front (of the eighth circle) and the ninth circle should be made of any extent (diameter) whatever. In this way the eight circles together with the spaces (kept after each) will together come up to 256 ***angulas***.

Eight ***yavas*** (barley grains) placed together by their breadth or three grains of rice with ends against each other (i. e. placed lengthwise) are the measure of an ***angula***, a ***vitasti*** is equal to twelve ***angulas***; the cubit is equal to two ***vitastis*** (spans of the hand), a ***daṇḍa*** is equal to four cubits, while a kros'a is equal to 2000 daṇḍas and a ***yojana*** is four ***kros'as***.

(The measures of length) ***vitasti*** and the rest will be of use later on.[1] Then having worshipped in the nine circles beginning from the west the superintending deities of each viz. Agni, Varuṇa, Vāyu, Yama, Indra, Kubera, Soma, Savitṛ and all the gods, and having kindled ordinary domestic fire to the south of the ground occupied by the circles, the judge should offer ghee by way of propitiary rite 108 times with the words '*svāhā* to Agni the purifier'. Then having cast into that fire a round iron ball without edges, that is smooth, eight ***angulas*** in diameter, weighing fifty ***palas***, and having performed the series of rites from the invocation of ***dharma*** to the offering of oblation into the fire as detailed above in the balance ordeal while the iron ball is being heated, the judge, when the ball has been heated the third time, should recite the following ***mantras*** by way of invocation before the fire in the (heated) iron-ball.

¶Thou, Oh Agni, are the four Vedas and to thee offerings are made in sacrifices, thou art the mouth of all the gods and of all ***brahmavādins***;

1. i.e. in the section on water ordeal and on disputes between master and cowherd.
* P. 74 (text). ¶ P. 75 (text).

(expounders of *Brahma*); since thou dwellest in the stomach of all beings; thou knowest the good and evil (that men do); thou art called *pāvaka* (purifier) as thou cleansest out sin. Manifest thyself as regards sinners, oh purifier, and send out thy flames, or oh Fire, become pure[1] as to those whose minds are pure. Oh Fire, thou movest like a witness inside all beings, thou alone knowest, oh god, what men do not know. This man, accused of a wrong in a judicial proceeding, desires to be cleared (of it); therefore thou wilt please save him from this suspicion according to the (dictates of) *dharma*[2].

Tṛtīya-tāpaḥ (heating the third time) means 'in order to purify the iron, throwing into water the iron ball that is well heated, again heating it and throwing it into water, and then again heating it'. Having held by means of a pair of tongs the iron ball that is well heated and so red-hot and before which *mantras* have been recited as above, and having brought it in front of the person performing the ordeal who has observed a fast, who has bathed, whose garments are wet and on whose head is tied the writing embodying the subject matter of dispute and who stands in the westernmost circle, the judge should place it on the hands (of the person undergoing ordeal) that have been *purified* (*or treated in manner following*) after the person has recited by way of invocation the *mantra* :—

Thou, Oh Agni, Purifier, movest inside all beings; wise one! declare the truth about me out of meritoriousness or sin (i. e. whether I am innocent or sinful) like a witness[3].

The word '*kṛtasaṁskārayoḥ*' (that have been purified) means 'that are folded after grains of rice are rubbed over them, that are marked with *alaktaka* (red dye) in places where there are dark *sesamum-like spots, wounds, or hardened skin, *that* have placed in them seven leaves of *As'vattha* of equal length or in case the latter are not available, seven leaves of the Arka plant, seven leaves of *S'amī* or of *Dūrvā*, sacred grains of rice, and also grains of rice smeared with curds and flowers; and that (hands) are covered over seven times with seven white threads. Then the person performing the ordeal, planting his foot just on the circles (i. e. so as to exactly cover them) from the second to the eighth and having thus walked slowly seven steps, should cast the (red-hot) iron ball held in his folded hands on to the ninth circle. Then after his hands are again rubbed with grains of rice, if they are (found to be) unscorched, he is pure (innocent),

Here ends the method of the fire ordeal.

1. The reading of Mit. and Aparārka 'be cool' for 'be pure' is decidedly better.
2. The last two verses are Viṣṇudharmasūtra 11. 11-12.
3. This is Yaj. II. 104.

* P. 76. (text).

Now (begins) the method of the water ordeal.

Pitāmaha (says):

Henceforward I shall declare the ancient and proper method of water (ordeal). A wise (judge) should get a circle (of ground) prepared (cow-dunged). He should piously worship arrows with incense and lamps and a bamboo bow with auspicious rites, flowers and incense and then carry on the rites (connected with the ordeal).

The word *dhūpadīpābhyām* (with incense and lamp) is to be connected with the words *s'arān sampūjayet* (he should worship the arrows). And the worship is to be performed in the (cow-dunged) circle. Nārada (p. 112 v. 307) speaks of the lengths of bows;

A formidable bow measures 107 (*aṅgulas*), a middling one is declared to be 106 in length and a feeble (of lowest length) one is known to be 105. This is the detail about bows. A clever man, placing a target at (the distance of) 150 cubits (from himself), should discharge three arrows with a middling bow.

**Saptas'atam* means 'hundred and seven aṅgulas'. In the same way are to be explained *ṣaṭs'atam* and *pañcas'atam*. Kātyāyana says:

He should employ for the purpose of purification (by water ordeal) arrows the points of which are not made of iron, but of pieces of bamboo, while the person discharging (the arrows) should discharge them forcibly.

Nārada (p. 257 v. 53, p. 256 v. 51 and p. 258 v. 58) says:—

Having gone to a reservoir of water, one should erect on its bank a *toraṇa* as high as the ear (of the person performing ordeal) on a holy and even plot of land. He, having his mind composed, should first offer worship to Varuṇa, with fragrant sandal paste and flowers and with honey, milk and ghee. A strong man, either a Brāhmaṇa, *Kṣatriya* or *Vais'ya*, free from love or hatred (for the person undergoing ordeal), should be made to stand like a post in water as deep as his navel.

Pitāmaha says:—

The king should first make a person hold the post (of a sacred tree like *khadira*) and stand in water facing the east and having made the person who performs the ordeal to stand in water, he (the king) should invoke the gods and should recite *mantras* before the water.

Devān means '*dharma* and the rest'. He should perform (the rites) beginning with the invocation of *dharma* and ending with the placing of the

* P. 77 (text).

writing on the head (of the person performing ordeal). The *mantras* to be recited by way of invocation will be found in the *prayoga* (the detailed description of the sequence of the rites given below).

Vyāsa says :[1]

> Having invoked water with the word ' Oh Varuṇa, save me with truth ', he (person performing ordeal) should dive into the water, holding the thighs of the person who stands in naval-deep water.

Kam means ' water ' and *abhis'āpya* means ' having recited *mantras* before it '. Bṛhaspti (p. 318 v. 21) says :

> After making the (strong) man enter the water, three arrows should be discharged;

*Pitāmaha says :

> The discharger (of the arrows) should be a *kṣhatriya* or even a *brāhmaṇa* subsisting by the same calling (viz. that of a *kṣatriya*); he should not be cruel of heart, should be peaceful, pure and should have observed a fast.

Kātyāyana says :

> When (the arrows) have been discharged, (the person undergoing ordeal) should dive into the water and at the same time (another person) should run (to the place where the second arrow is lying).

The meaning is ' simultaneously with the diving ' (running should be done). Nārada (p. 113 vv. 309--312) and Pitāmaha say :

> A young man possessed of speed should run with his utmost strength from the place whence the arrows were shot (i. e. from the toraṇa) to the place where the second arrow fell. Another man of the same sort (i. e. young and swift) taking the second arrow then returns with speed to the place whence the other (young) man started (i. e. to the *toraṇa*). If the (young) man who carries the arrow does not see when he comes (to the toraṇa) the person (the *s'odhya*) who had dived into the water, then (the judge) should declare (the *s'odhya*) to be pure (innocent); otherwise he would not be purified, even though only a single limb (such as the ear) were seen or even if he were to float to a place other than where he was first made to enter (i. e. where he dived).

The word *ekāngasya* should be construed as referring to the ear. And so Kātyāyana says :

> (the king) should declare him also to be purified whose head alone is seen after he plunges into water, but neither the ears nor the nose. '

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1. This is also Yāj. 2. 108.

* P. 78 (text).

Pitāmaha says:

It is the place where the arrow first fell that is to be taken, the distance covered by its creeping is to be left out of account.

*Nārada (p. 258 v. 57) says:

Those two who, out of fifty runners, would surpass in speed the others should be appointed for the purpose of bringing the arrow.

Now begins the ceremonial in sequence (of the water ordeal). The place of water that is to be used (in this ordeal) should be a river, the sea, a deep reservoir, reservoir near a temple, a lake or a pond, the water whereof is not agitated. Scanty waters, or those that are brought artificially or that are full of weeds, moss, waves, mud, sharks, leeches or fish or the like or that flow rapidly, should be avoided. In such water that is navel-deep a post of ***dharma*** made of sacrificial tree (viz. ***khadira***) should be implanted. Near it on the western bank (of the water) a ***toraṇa*** (an ornamental arch or structure) as high as the ear of the person performing ordeal should be raised. Near it should be placed a bamboo bow of 106 ***angulas*** and three bamboo arrows the ends of which are not made of iron. The target should be erected in a good spot at a distance of 150 cubits from the ***toraṇa***. Then having worshipped the bow together with the arrows with white sandal paste and white flowers, having invoked Varuṇa in the reservoir of water, and having worshipped him (Varuṇa),[1] having carried out (the rites) beginning with the invocation of ***dharma*** and ending with oblations to fire that have been already described, and having tied on the head of the person to be cleared (by ordeal) the writing containing the matter of complaint, the jugde should invoke water with the following ***mantra***:

Water! thou art the life of living beings, thou wert created the first in creation, thou art declared to be the means of the purification of substances and embodied beings; therefore show thyself in (this) investigation about righteousness and sin.

Then the person (who performs the ordeal) should recite the ***mantra*** 'satyena mābhirakṣa tvaṁ Varuṇa' (Yaj. II. 108 p. 67 above). Then the person who performs ordeal should approach the strong man who holds fast the post of ***dharma***, who faces the east and who stands in water navel-deep. Then from the place where the bow was kept a ¶ ***kṣatriya*** or a ***brāhmaṇa*** pursuing the former's avocation should firmly shoot towards the target three arrows that have no iron points. Then one swift person should stand holding the middle arrow at the place where the arrow fell not minding the distance over which it crept and another (equally) swift man should stand at the foot of the toraṇa whence the arrows were discharged. And a swift man (here) is one who

1. In the Ṛgveda and in later mythology also Varuṇa is the lord of waters. Vide Ṛg. VII. 49. 3 yāsām rājā Varuṇo yāti &c.

*P. 79 (text). ¶ P. 80 (text).

surpasses in speed fifty runners. Then the judge standing at the foot of the torana should clap his hands thrice and simultaneously with the third clap the person undergoing ordeal and the swift man at the foot of the torana should (respectively) dive and run fast. The diving should be done after holding the thighs of the person who holds fast the post of ***dharma***. Then when (the swift man) reaches the place of the falling of the middle arrow the (other swif man) who stands there holding the arrow should go fast to the ***torana*** and if he finds the person performing the ordeal still inside the water then he is cleared (of guilt). He is cleared even if only the head is seen, but not if he sees some other limb such as the ear or if he (the s'odhya) floats to some spot other than where he dived. Here ends the method of water ordeal.

Now (begins) the method of poison ordeal.

On this point Nārada (p. 260 vv. 69–70) says :—

> After having worshipped Mahes'vara[1] (S'iva) with incense, offering (of food) and ***mantras***, one should, after observing a fast, administer poison (by way of ordeal) in the presence of gods (idols) and ***brāhmaṇas***. A brāhmaṇa, whose mind is concentrated and who faces the north or the east should administer (poison as ordeal) only in the presence of ***brāhmaṇas*** to a person who stands facing the south.

The same author (Nārada p. 115 v. 324) states the quantity of the poison (to be administered):

> In the rains the quantity (of poison) is to be of the weight of four ***yavas*** (grains of barley), in summer it is declared to be five ***yavas***, in ***Hemanta*** (i. e. December and January) it is to be seven ***yavas*** and in S'arad (i. e. October-November) of less quantity than the latter.[2]

*Alpā' (of less quantity) means 'of three ***yavas***'. ***Hemanta*** includes (the season of) s'is'ira also (i. e. February and March) as S'ruti (the Veda) compresses the[3] two (seasons into one); while ***Vasanta*** (spring, April and May) follows as a matter of course, as it is declared (vide above p. 46) as a common season for all ordeals. Vijñānes'vara holds that in that season also the quantity of poison is to be seven ***yavas***. And poison should be administered with ghee thirty times as much, since Kātyāyana says :—

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1. S'iva is to be worshipped here most appropriately as in mythology he swallowed the terrific *hālāhala* poison that sprang up when the ocean was churned by the gods.

2. According to the Mit. and the Vīr., this last means ' of six *yavas*. '

3. This is a reference to the Aitareya-Brāhmaṇa I. 1., where we have ' there are five seasons in a year, Hemanta and S'is'ira being compressed into one. '

*P. 81 (text).

To human beings poison should be administered (as ordeal) in the forenoon and in a cool spot, after mixing it with ghee thirty times as much and after powdering it well.

Yājñavalkya (II. 110) states how poison is to be invoked :

Poison ! thou art the son of Brahmā, thou art firm (or fixed) in the duty of (deciding) the truth. Save (me) from this accusation and be like nectar to me by truth (i. e. if I be innocent).

Nārada (p. 116 v. 326) says :

He (the person performing poison ordeal) should be kept in the shade, should be guarded for the rest of the day without food. If he be not affected by the (ordinary) effects of poison (till the end of the day), then Manu says that he is purified (innocent).

The same author states another period (of waiting) when the quantity of poison is very large :

When a man shows no change (due to the circulation of poison) for a period of five hundred clappings of hands, then he is purified (he should be declared innocent) and then medical treatment should be resorted to (to cure him).

In the system (treatises) on poison the stages of the working of poison (are stated to be the following) :

The first [1]working of poison causes horripilation, the next after that (causes) perspiration and dryness of mouth, the next two (workings) produce in the body change of colour and tremor ; the fifth stage of working (gives rise to) restlessness of the eyes, hoarseness of throat and hiccough, the sixth causes heavy breath and loss of consciousness and the seventh causes the death of the person who swallows the poison.

Here (the person performing the ordeal) is to swallow the poison placed before Mahādeva (an idol of S'iva) by the judge who has observed a fast.

Now (begins) the method of the ordeal of *kos'a* (holy water).

Pitāmaha says :

A man should be made to drink the water (of the worship) of that deity of whom he is a devotee ; but if he be equally a devotee of all deities (i. e. if there is no special predilection in favour of one particular deity), he should be made to drink the water of (the worship of) the Sun. The water (of the worship) of Durgā should be given to thieves and to those who live by the profession of arms ; but a brāhmaṇa should not be made to drink the water of the Sun.

Bṛhaspati (p. 318 v. 23) says ;

1. This verse is quoted in the Mit. (on Yāj. 2. 111).

* P. 82 (text).

Having washed the weapons of that deity to whom the person charged is devoted, he should be made to drink three handfuls of that water.

Nārada (p. 262 v. 81) says :

Having summoned the person charged and having placed him in a (cowdunged) circle facing the Sun, (the judge) should make him, who has taken a bath, whose garments are wet and who is pure, drink three handfuls (of holy water) according to the ritual described before (as common to all ordeals).

Nārada (p. 262 v. 82) says ;

Having worshipped that deity (to whom the person charged is devoted) and having washed (the image of that deity) with water and having repeated (before the deity) his wrong-doing, (the judge) should make him drink three handfuls (of the holy water).

Here having observed a fast (the previous day), having in the forenoon worshipped the deity (that is a favourite with the person undergoing the ordeal), having taken the water used in bathing the (image of the) deity, having performed (all the details) from the invocation of *dharma* and ending with the placing of the writing on the head, the judge should invoke that water with the *mantra* that is given in (the section on) the water ordeal. The person performing the ordeal also having recited the *mantra* by way of invocation as stated in the same (section) should swallow (the water). Bṛhaspati (p. 318 v. 24) says :

There is no doubt that if no misfortune is seen to visit him (who *performs the kos'a ordeal) or his son*, wife and wealth within a week or within two weeks (from the day of the ordeal), he is innocent.[1]

*Now (begins) the method of (the ordeal of) rice.

Here Pitāmaha says :

I shall declare the method of grains of rice about which information is conveyed in (works) defining it. Grains of rice are to be given (as ordeal) in theft and in no other case[2] ; this is settled. Grains of rice (*S'āli*) and of no other corn should be made white (i.e. unhusked). (The judge) should place, himself being purified, those (grains of rice) before the (image of the) Sun in an earthen vessel, mix them with the water in which the image of the Sun is bathed and keep them there (i. e. immersed in that water) for that night, having first of all performed on that night according to the *s'āstra* the rites beginning with the invocation (of *dharma* and other deities).

1. Compare Yāj. 2. 113 and Viṣṇu. Dh. S. XIV. 4—5. The period of seven days applied to light offences.

2. This is only illustrative. It only means that this ordeal was employed only where the disputes related to money.

* P. 89 (text).

Kātyāyana also says:

In (the ordeal of) swallowing the grains of rice immersed in the water of the bath of the deity, (the person performing it) should be decided to be pure (innocent) if the saliva (that he spits) is unmixed (with blood) and should be decided to be impure (guilty) if it be otherwise.[1]

Pitāmaha (= Nārada p. 119 v. 342) says:

(The judge) should declare him to be impure (guilty) who shows blood (in his saliva), whose chin and palate are shattered, whose body has a tremor.

Now (begins) the method (of the ordeal) of the heated mass (of gold).

Pitāmaha says:

I shall declare the good method of the heated *māṣa* (of gold) in freeing (men from accusations). (The judge) should have a round vessel of iron or copper or clay made, of sixteen *angulas* (in diameter) and four angulas deep. He should get it filled with ghee and oil, weighing twenty *palas*; *when the latter (ghee and oil) are well heated (the judge) should then cast in it a gold piece weighing a *māṣaka*.[2] He (the person performing the ordeal) should take out the heated golden *māṣaka* with the thumb and the fingers of his hand.[3] If he does not jerk his fingers or there is no scalded skin (when he takes out of the ghee and oil the heated piece), he, whose fingers are uninjured, should be declared to be innocent by virtue of his righteousness.

The same author (Pitāmaha) describes another method (of this ordeal).[4]

He (the judge) being pure should put cow's ghee in a vessel of gold silver, iron or clay and have it heated on fire. He should cast into it a beautiful seal-ring washed once with water and made of gold, silver, copper or iron. When (the ghee) is full of whirling ripples and bubbles and when it is not capable of being touched (even) with the nails, he should test it (i. e. whether it has reached the boiling point) with a green leaf so as to produce the sound of 'churu'.[5] Then he should once repeat the following *mantra* by way of invocation before it (the heated ghee): Thou art, Oh ghee, the holiest thing

1. According to Nārada (ṛṇādāna 341) he should be made to spit on a leaf of *aśvattha* or *bhūrja*,

2. A golden *māṣaka* was equal to five kṛṣṇalas (*gunjas*).

3. The forefinger and the middle finger were to be joined to the thumb in taking out the heated piece of gold.

4. Thes five veres are also Nārada (pp. 119--120 vv. 344--48),

5. When ghee reaches the boiling point, if a green leaf were dipped into it, there would be a sound similar to the word '*churu*'. This is the test for finding out whether the ghee has reached the boiling point.

* P. 84 (text).

in sacrifices, thou art nectar, oh purifier: burn him (the person undergoing ordeal) if he be a sinner, be cool as ice if he be pure'. Then he (the judge) should make him (the person performing the ordeal), who has fasted, who has taken a bath, who comes with wet garments on, take out the seal-ring from the midst of the ghee. Then persons who are (appointed to) supervise (the ordeal) should examine his forefinger. That man is pure whose skin is not scalded; otherwise he is impure (guilty).

The method of (ordeal by) ploughshare.

Bṛhaspati says (p. 318 v. 28).

The ploughshare (*phāla*) is said to be of iron, weighing twelve palas and eight aṅgulas long and four aṅgulas broad. *The thief should lick it once with his tongue when it is red hot. If he is not burnt, he establishes his purity (innocence), if otherwise he loses (i.e. he is guilty).

Now (begins) the method (of ordeal) based on (image or picture of) Dharma.

Pitāmaha says:—

I shall now describe the method of testing by means of *Dharma* and *Adharma* men who are guilty of causing bodily injuries, or who have monetary disputes or who desire to undergo penance (for sins). He should have prepared a silver (image of) dharma and a leaden or iron (image of) adharma or he (the judge) should draw on *bhūrja* (birch leaf) or on a piece of cloth dharma and adharma (respectively) of white and black colour. Having sprinkled (over the images or pictures) *pañcagavya*,[1] he should worship (dharma and adharma) with sandal paste and flowers. (The image or drawing of) dharma should be worshipped with white flowers and adharma should wear dark flowers. Having performed these rites and applied sandal-wood paste to them, he should place them (images or drawings) inside two balls which are made of cowdung or clay. The two should be placed unseen inside an unused (i. e. new) earthen vessel in the presence of gods (idols) and brāhmaṇas and in a cowdunged and holy spot. He should then invoke the gods and *lokapālas* as laid down already (in the section on rites common to all ordeals p. 48). After having invoked dharma he (the judge) should write on a leaf (or paper) the subject matter (of dispute or complaint). 'If I am free from guilt, may (the image or drawing of) dharma come to my hands'— (saying this) the person charged should quickly catch hold of one (out of the two images).[2] If he takes hold of dharma he is (to be declared)

1. The five things with which this is prepared are the dung, urine, milk, curds, clarified butter of a cow.

2. This procedure closely resembles drawing lots.

* P. 85 (text).

innocent; if he takes hold of adharma he loses (i. e. he is guilty). In this way has been briefly declared the testing (of an accused) by means of dharma and adharma.

Bṛhaspati* (p. 319 vv. 30–33) says:—

Dharma and adharma should be drawn on two leaves (respectively) as white and dark. Having invoked them with *mantras* that infuse life (into images[1]) and with *sāman* hymns like the Gāyatra[2] and others, he should worship them with sandalwood paste and with white and dark flowers. Having then sprinkled *pañcagavya* over them and having placed them inside clay balls of equal size, they (the clay balls) should be placed unobserved in a jar. Then (the person performing this ordeal) should quickly take out of the jar one of the balls. If dharma is drawn then he is (to be declared) pure and should be honoured by those who tested him.

Now (begins) the procedure[3] (in sequel of the various items in this ordeal). Having drawn a white image of dharma and a dark one of adharma on two leaves, having recited the *mantra* '*āṁ, hrīṁ, krauṁ, haṁ, yaṁ, raṁ, laṁ, vaṁ, śaṁ, ṣaṁ, saṁ, haṁso*[4], the prāṇas (life) of *dharma* (may be present) here again', having recited 'the life of dharma is again established here', having (ceremonially) endowed with life the painting of dharma, with these wards 'may all the sense organs of dharma speech, mind, eyes, ears, smell and prāṇas (life-breaths) come here, happily dwell here long, *svāhā*' and having invoked (dharma) with the recitation of the *Gāyatra sāman*, if it be known, or if unknown, with the recitation of the *Gāyatrī mantra* together with the *Vyāhṛtis*[5] and (the sacred) syllable *om*, haying worshipped dharma and adharma with a white and a dark flower respectively, having sprinkled *pañcagavya* (on the paintings of dharma and adharma) after uttering *om*, having placed in two clay balls dharma with the white flower and adharma with the dark flower, he (the judge) should place it in a fresh (unused) jar. The judge¶ should then perform the rites beginning with the invokation of dharma and ending with the *homa* to fire and should tie on the head of the person to be cleared the writing containing the subject matter of dispute to the accompaniment of (appropriate) *mantra*. The person to be cleared (of guilt) should say 'if I am free from sin, may dharma come to my hand and should take out

1. This refers to mantras that are prescribed for *prāṇa-pratiṣṭhā* (infusing life or endowing with godhead) of images. Vide notes to V. M. p. 112

2. Vide Sāmaveda (B. I. ed. vol. V p. 601) for *Gāyatra Sāman*.

3. The whole of this *prayoga* to the end occurs *verbatim* in the Divyatattva of Raghunandana.

4. For these mystical words compare Agnipurāṇa chap. 21.

5. The *Vyāhṛtis* are the mystic words 'bhūḥ, bhuvaḥ, svaḥ'.

*P. 86 (text). ¶ P. 87 (text).

from the jar one of the two (clay balls). If dharma is taken out (by him), he is (declared) innocent. Then he should distribute gifts.

Now (begin) oaths.

Manu (8. 113) says :—

A brāhmaṇa should be made (this occurs above p. 39).

Bṛhaspati (p. 315 vv. 6--7) says[1] :—

*Truth, riding animals and weapons, cows, seeds and gold, the *feet of gods and brāhmaṇas, the heads of one's sons and wife*, these are *said* to be (the forms of) oaths always ready at hand where the matter (in dispute) is small (not serious). In the case of *sāhasas* (heinous offences or offences accompanied with force) and accusations (of mortal sins) ordeals are said to be the means of purification (i. e. of establishing innocence).

Yājñavalkya (II. 113) says :—

There is no doubt that that man is pure on whom no formidable calamity due to God or the king befalls within fourteen days (from the time of his taking the oath).

Ghoram means 'formidable', as in the Mitākṣarā (it is said) that slight misfortune cannot be avoided by human beings. Kātyāyana also says :—

*That man who is not visited by any formidable calamity due to God or the king up to the fourteenth day (from taking oath) is to be regarded as pure by his oath.

Vyasanam means 'misfortune'. *Ghoram* means 'causing great affliction', since Vācaspatimiśra[3] and Smārtabhaṭṭācārya (i. e. Raghunandana) say that slight affliction is characteristic of (human) bodies. Kātyāyana again says :—

If within two weeks (from taking oath) there is contradiction (with the oath) shown by misfortune, he (the king) should by all means make the person charged to deliver the subject matter (of dispute) and a fine. If to the man alone (who takes oath or performs ordeal) and not to all alike, befall disease, fire, or the death of a near relative, he should be made to pay the debt and a fine. Fever, dysentery, boils, great pains in

1. Compare with these Nārada (ṛṇādāna 248--250) quoted above on p. 43.

2. Vide the Indian Oaths Act (X of 1873) for modern provisions as to oaths and affirmations.

3. Vācaspatimiśra wrote several works on *dharma* styled Cintāmaṇi, his Vivādacintāmaṇi being a work of great authority in Mithilā. He flourished towards the latter half of the 15th and in the first quarter of the 16th century. Vide 'History of dharmaśāstra' pp. 399--405.

*P. 88 (text),

the deep-seated bones, eye disease, disease of the throat, insanity, headache and fracture of the arm----these are the diseases of men which are (to be regarded as) due to (the wrath of) God.

Daivavisaṁvāde means ' in case of the death of a near relative and the like '. By the words *tasyaikasya* (when it befalls him alone) are excluded epidemic diseases (like cholera) that affect a whole locality (at once). In this passage as the word *tasya* refers to the word *abhiyukta* (the person charged) that already occurs (in the preceding verse), disease and the rest are an indication of defeat when they befall only the person charged and not when they befall his son or the like. That (disease or the like indication) again must be great (serious or formidable) and not slight. This has been already said above. With this very idea Vācaspatimiśra says ' the meaning is that disease and the rest that are peculiar to the person charged (and not common to all) are indications of defeat '. It is therefore that the text mentions only the death of a near relative and not the disease of a near relative.

The determination of heritage.*

Now (begins the discussion of) ownership that is useful in the determination of *dāya* and the like. And that (ownership) is a kind of capacity arising from purchase, acceptance (of a gift) and the like. That purchase and the like are the causes of ownership is understood from worldly usage alone and not from s'āstra[1] (alone), since it (the notion of ownership) is seen even among those who are ignorant of s'āstra and since it is more cumbrous to suppose that ownership springs from (the prescription of) s'āstra (than the other theory). Bhavanātha[2] also in his work called Nayaviveka says the same thing. As to the text of Gautama (Dh. S. 10. 39--42) ' ownership (arises) by *riktha* (heritage), purchase, partition, seizure (of things unowned) and finding (of hidden treasure &c,); in the case of brāhmaṇas, what is acquired (by gift) is an additional (source of ownership), in the case of kṣatriyas, gains of conquest (are an additional source) and *nirves'a* (profit making and service) (is an additional source of ownership) in the case of *vais'yas* and *s'ūdras* (respectively) ', it merely repeats the sources (of ownership) that are already known from ordinary worldly life.[3] People employ the word *riktha* to denote that which becomes one's own by the mere extinction of the (previous) owner's property therein. The word *mātra* (mere) is used (in the above definition of *riktha*) to exclude purchase and acceptance (from the denotation of *riktha*[4]). In this passage (of Gautama) the word *riktha* is capable of denoting such an extinction (of ownership) only, since it is mentioned along with (other) means of ownership such as purchase and the like[5] and on account of the maxim ' (the

1. Whether the question of ownership (over a thing) is understood from s'āstra alone or from the usage of worldly people is a subject very elaborately discussed in the Mit. The Smṛtisaṅgraha and Dhāres'vara held the former view, while the Mit., the Vīr. and most writers support the latter. Vide notes to V. M. pp. 114--115 for a statement of the reasons given by both sides for their views.

2. He is a mīmāṅsaka who wrote a commentary on S'abara's Bhāṣya. As the Smṛticandrikā quotes him, he is earlier than 1150 A. D. Vide p. 480 of the notes to V. M.

3. Those who say that ownership springs from s'āstra rely upon Gautama's text as a support. They argue that if ownership were *laukika*, Gautama need not have written an elaborate passage. To this Nīlakaṇṭha gives a reply in the following rather elaborate passage. Several digressions come in while Gautama's text is being expounded. Anuvādaka (that merely repeats) is opposed to *vidhāyaka* (that prescribes). Vide notes to V. M. pp. 164, 368 for *vidhi* and *anuvāda.*

4. In the case of *riktha* the moment the previous owner dies his son or grandson becomes owner without any further act. In the case of a gift or purchase, the donee or the purchaser must do some act (such as accepting the gift or taking possession &c.).

5. The argument briefly is this :—*riktha* in popular parlance means ' wealth which becomes one's own on the death of the previous owner.' But in Gautama's sūtra ' purchase, partition &c. ' are *means* of acquiring wealth and *not* wealth itself. Therefore *riktha* which is associated with them must also convey 'means of acquiring wealth' and not wealth itself. In the ordinary popular meaning of *riktha* two notions are combined viz. *wealth* and mere extinction of previous ownership as a means of acquiring it. Out of these two in Gautama's text we must understand the latter as the meaning of *riktha.* Vide notes to V. M. pp. 116-117.

* P. 89 (text).

apprehension of a thing does not arise) unless the attributes of the thing are (first) apprehended[1] '.

Dhāres'varācārya[2] and the author of the Smṛtisaṅgraha say 'partition generates ownership for the sons and the like in the wealth of the father, which (ownership), while the father was living, did not at all exist before in the sons[3].' But this is not correct; since by such texts as 'by birth itself (sons) acquire ownership over wealth '[4] it is conveyed that the birth of a son by itself produces over the father's wealth ownership which is limited by the relation of sonship and since Yājñavalkya (II, 121) says: [5]

> The ownership of both father and son is the same in land acquired by the grandfather, in *nibandha*[6] and in chattels.

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1. Vide notes to V. M. pp. 117-118. When we say 'Daṇḍī puruṣaḥ' we cannot correctly apprehend the man (the *viśeṣya*) unless we first understand daṇḍa (stick), which is an attribute of the man. *Riktha* in popular parlance conveys two notions viz. wealth (the *viśeṣya*) and extinction of ownership as the means (the attribute of that wealth). Therefore when we understand the latter (i. e. the attribute) we can understand the whole notion of *riktha*, i. e. the first notion that strikes one when the word *riktha* is used is the extinction of former owner's ownership and therefore that is the primary meaning of the word in Gautama's text.

2. Dhāres'vara is king Bhoja of Dhārā, one of the most famous patrons of literature in India. He reigned between 1005 and 1055 A. D. Vide 'History of Dharmas'āstra.' pp. 275-279. He is quoted by the Mit.

3. There were two views, *viz.* that ownership arises (first) on partition of what did not belong to a man before that date or that partition takes place of that which already belonged to one's self (though jointly with others). The former is the view of Dhāres'vara and Jīmūtavāhana, the latter of the Mit. and a host of writers. The lines 'Dhāres'varācārya ...correct' are quoted in *Bai Parson* v *Bai Somli* I. L. R. 36 Bom. 424 at p. 429 where it is said that the contrast between 'by birth' and 'by partition' is significant, because therein lies the root idea or basic principle of the coparcenery system as distinguished from a tenancy in common.

4. This text is attributed to Gautama by the Mit, and several other writers and is variously read, while Jīmūtavāhana, Aparārka do not refer to it and a few writers like S'rīkṛṣṇa Tarkālaṁkāra say that it is spurious. It is not found in the printed Gautama Dh. S. Vide notes to V. M. pp. 119--121 for details.

5. The words 'by birth .... chattels' are quoted in *Jugmohandas* v. *Sir Mangaldas* I. L. R. 10 Bom. 528 at p. 547. 'Pitāmahopātta' is rendered as 'received from the grandfather' by Mandlik at p. 32 but on p. 43 as 'acquired by the grandfather'. Telang J. in *Apaji* v. *Ramchandra* I. L. R. 16 Bom. 29 at p, 50 translates as above. Vide *Samalbhai* v. *Someshvara* I. L. R. 5 Bom. 38 at p. 40 where it is said that 'an ancestral trade may descend like other inheritable property upon the members of a Hindu undivided family'.

6. The word *nibandha* means a grant of a fixed payment at stated times such as a year or a month to a person or temple, generally under the orders of a king, such as so many betel leaves out of each load of betel leaves sold &c. Colebrooke translated the word as 'corrody', but, as was observed by their Lordships of the Privy Council in *Maharana Fattehsangji* v. *Dessai Kallianraiji* L. R. 1 I. A. p. 34, 51 it was not a very happy translation of it, since 'corrody' a word of medieval origin, properly signifies a peculiar right viz. the grant by the royal or other founder of an abbey of certain allowances out of the revenue of the abbey in favour of a dependent or servant'. Vide *the Collector* of *Thana* v *Hari Sitaram* I. L. R. 6 Bom. 546 (F. B.) at pp. 555--559, *Lakshmandas v Manohar* I. L. R. 10 Bom. 149, *Jatindra Mohan* v *Ghanashyam* 50 Cal. 266 at p. 271 for various definitions of *nibandha*. Vide *Collector* of *Thana v Krishnanath* I. L. R. 5 Bom. 322 at pp. 331--332 for a discussion of what was included in *nibandha*.

*It cannot be said that this (text) conveys that the cause of the production of ownership is the death of the grandfather and not the birth of the son,[1] since (if that view were accepted) there would arise the unacceptable result that a grandson not born at the death (of the grandfather) would have no ownership (in what was his grandfather's property). Really speaking, the word ***pitāmaha*** (in Yājñavalkya's text ' bhūryā pitāmahopāttā) is not intended (to be taken literally), because otherwise it would follow that there is absence of equal ownership (in father and son) in what is acquired by the great-grand-father or the like, and because it (the word ***pitāmaha***) is an attribute of the ***anuvādya***[2] (the subject). As to the text of Devala.[3]

> When the father is dead, the sons should divide their father's wealth, for as long as the father who is free from any defect (bodily or mental) lives, there is absence of ownership in them.

The first half (of this verse) only enjoins the time of partition, as the potential termination is found (in the word ***vibhajeyuḥ***), while the latter half only commends the time (of partition laid down) and indicates that the sons are dependent, but is not to be construed as laying down absence of ownership (in them during the father's lifetime[4]). This (interpretation) explains the text of S'aṅkha also viz. ' while the father is alive, the sons should not divide the ***riktha*** and also whatever might have been acquired by them after (they were born); sons are not entitled (to separate in the father's lifetime), as they are not independent (of him) in matters of wealth and the

1 This is directed against those who, like Jīmūtavāhana, hold that ownership even in ancestral property arises not by birth but on the death of the previous owner. Vide notes to V. M. p. 121.

2. The word *anuvādya* means ' subject ', about which something is to be enjoined and is contra-distinguished from *vidheya* (predicate or what is to be enjoined). In the text of Yājñavalkya what is to be enjoined is equal ownership of father and son. The subject (*anuvādya*) of which this is enjoined is *bhū* (land). *Pitāmahopātta* is only an attribute of the subject *bhū* and forms no part of what is enjoined with reference to *bhū*. Hence it is not to be taken literally, but only illustratively. So nothing turns on the mention of *pitāmaha* (which stands for ' ancestor)'·and that passage says nothing about the death of the *pitāmaha*. Vide notes pp. 121--122 to V. M. for further explanation and the two other ways in which Yājñavalkya's verse is explained in the Dāyabhāga.

3. This text of Devala is a sheet anchor of the Dāyabhāga theory.

4. The potential is used in laying down *vidhis*. In the word *vibhajeyuḥ* (should divide) we have the potential termination and so that portion enjoins a rule. What follows gives the reason and so is a mere arthavāda and not to be taken literally. Vide Jaimini I. 2. 26--30 (hetuvan—nigadādhikaraṇa). Arthavāda only expatiates upon or recommends a *vidhi*. Nīlakaṇṭha draws a distinction between *svatva* (ownership) and *svātantrya* (absolute power of disposal). A woman owns her *strīdhana*, she has no *svātantrya* over it (excepting *saudāyika*) during her husband's life-time.

* P. 90 (text).

performance of *dharma* (religious duties[1])'. Here the mention of dependence (in the latter portion of the passage) that immediately follows the prohibition contained in the first part serves as its *arthavāda* (commendatory sentence). The construction of the passage is '*yadyapi taiḥ pas'cāt adhigatam*' (whatever was acquired by them after birth). '*Taiḥ*' means 'by the sons'; *pas'cāt* means 'after birth'; *adhigatam* means 'acquired by acceptance (of a gift) and the like'. The real purport is; nobody disputes that there is ownership (of the sons) in what is accepted by the sons (as a gift); even as to these latter there is dependence (of the sons), how much more so with reference to what is acquired by the father. And this dependence (of the sons on their father) has reference to partition, such religious rites as are *kāmya*[2] (voluntary) and engaging in trade. It is therefere that Hārita says, 'while the father lives, the sons have no independence as regards the receiving and giving of wealth, as regards partition and censure (of servants)'. The words '*ādānavisarga*' (receiving and giving) indicate (all kinds of) transactions. According to Madana, *ākṣepa* means 'the reproving of female slaves &c.'. As for the text[3]

> The father alone is the master of everything, gems, pearls and corals; but neither the father nor the grandfather is (the master) of all immoveable property

1. Vide notes to V. M. pp. 122--123 for various explanations of the text ol S'aṅkha. Here the words up to 'should not divide' contain a prohibition and so imply an opposite *vidhi* and the rest merely expatiate upon, recommend and give a reason for the preceding prohibition, just as in the text of Devala.

2. Religious rites are *nitya* (obligatory, like sandhyāvandana), *naimittika* (to be performed on particular occasions only, such as those on the birth of a son) and *kāmya* (to be performed voluntarily if one desires a certain result, such as *putreṣṭi* for one who desires to have a son.)

3. This verse is ascribed to Nārada by Aparārka, to Yāj. in the Dāyabhāga and is cited in the Mit. without the author's name. This verse is variously interpreted. The Dāyabhāga holds that this refers to the property of the grandfather, that after the grandfather's death the father cannot alienate immoveable property received from the grandfather, but that the father can make a gift of ancestral movables. According to the Mit. this verse favours the theory of son's ownership by birth and only authorises the father to make a gift of ancestral movables through affection (gems, pearls being illustrative). Nīlakaṇṭha goes further and says that the father cannot make a gift of ancestral movables but can only regulate their wearing by members of the family. In *Lakshman Dada* v. *Ramchandra Dada* I. L. R. 1. Bom 561 at p. 567 the verse 'the father alone is the master' &c. and the comment of the Mayūkha theseon is aqoted and it is said that the Mayūkha limits the power of the father even more strictly than the Mitākṣarā and it was held that a Hindu father who has two undivided sons cannot, whether his act be regarded as a gift or partition, bequeath the whole or almost the whole of ancestral moveable property to one son to the exclusion of the other. Vide the same case in I. L. R. 5 Bom. 58 (P. C.). In *Jugmohandas* v. *Sir Mangaldas* I. L. R. 10 Bom. 528 at p. 548 the above verse and the comment of the Mayūkha thereon are quoted. Vide *Bachoo* v. *Mankorebai* 29 Bom. 57 at p. 62 for reference to Mayūkha. Vide 24 Bom. 547 (=2 Bom. L. R. 478), 39 Bom. 593, 49 I. A. 168 for other cases of of gift or bequest by the father or managre.

*That text signifies only this that the father is independent only in the matter of the wearing of ear-rings, rings, but it does signify that the father is independent as regards the gift of these nor is it meant to exclude the birth of a son as giving rise to ownership. This very meaning is suggested also by the mention (in the above verse) of gems and the like that are not destroyed by mere use[1]. Hence in the text

Though immoveables and bipeds (slaves) may have been acquired by (the father) himself, there is no giving away or selling them without convening (consulting) all the sons

there is a prohibition only of gift, sale and the like and not of their enjoyment. Therefore the prior undefined ownership of several brothers and the like is clearly defined by partition. According to [2]some, by the extinction of prior (joint) ownership over the wealth that is collected in a mass, a new ownership different (from the prior joint ownership) is created (by partition) in a portion of that (the wealth jointly owned in a mass). But, since there is cumbrousness in the hypothesis of the extinction of prior (joint ownership) and the creation of a new ownership, it is more proper (to say) that (ownership) which previously (to partition) existed in an indeterminate) portion (of the things jointly owned) is made known by partition as subsisting in definite things.

Now to return to the matter under discussion[3]. According to some, the words (in Gautama's text, '*brāhmaṇasya adhikam labdham* mean that what is acquired by acceptance (of a gift) is productive of more fruit (of greater merit) to the *brāhmaṇa*; but it is better (to interpret those words as meaning) that this (acceptance of a gift) is an additional source (of ownership) for a brāhmaṇa alone and similarly conquest and the like are (additional sources of ownership) for kṣatriyas and the rest. Even in the case of conquest, ownership arises in the conqueror only as regards those things such as houses, lands and chattels wherein the conquered had ownership. But where the conquered was only entitled to levy a tax, there the conqueror too is entitled to that (tax) alone and not to ownership. Therefore it is said in the sixth[4]

1. The idea is that the father has the absolute right to regulate the wearing of gems and the like by members of the family and that by the father exercising such power, the sons are not affected in any way as they are not lost to the family.

2. This refers to the view of Raghunandana in his Dāyatattva. Vide notes to V. M. p.125.

3. The author digressed into the question whether ownership was by birth and reverts to the question whether the text of Gautama (ownership arises &c.) supports the view of ownership being *laukika* or being understood from S'āstra alone.

4. The sūtra is Jaimini VI. 7. 3 'the earth is not fit (to be given away in the *Viśvajit* sacrifice) since it is common to all.' Mandlik takes *maṇḍala* in a technical sense, *viz.* circle of twelve kings (vide Manu VII. 155-156), but that meaning is inapplicable here, particularly as the word *māṇḍalika* is placed in contradistinction to *sārvabhauma* and as *maṇḍala* means in inscriptions a country (vide Indian Antiquary vol. 15. p. 107 and notes to V. M. p. 126). The S'ukranītisāra defines a māṇḍalika as one whose revenue is above three lakhs and below ten lakhs.

* P. 91 (text).

(chapter of Jaimini's Pūrvamīmāṅsāsūtra) that the whole earth cannot be gifted away by the emperor and a country by a feudatory chief. The ownership in the several villages and fields in the whole earth or in a country (maṇḍala) belongs to the holders of the land alone, while kings are entitled only to collect taxes (from them[1]). Therefore when now (kings) make what are technically called gifts of fields, no gift of land (the soil) is really effected, but only provision is made for the maintenance (of the donee on the tax which is alienated to him by the king). Where however houses and fields are purchased (by the king) from the holders (thereof), he has also ownership in them and therefore he secures the merit of the gift of land (in such cases). *Nirviṣṭam* (in Gautama's text) means 'what is acquired by agriculture, money-lending, trade and rearing of cattle and what is acquired by service, since the lexicon (of Amara) says that the word *nirves'a* means 'hiring for service and enjoyment'. *Bhṛti* (in* Amara's lexicon) means 'service' and *bhoga* (enjoyment) means 'money lending and the rest'. Here the first (meaning of *nirviṣṭa* viz. money lending &c.) is (an additional source) in the case of vais'yas and the second (viz. service) in the case of s'ūdras. Hence that purchase and the rest are sources (of ownership) follows from ordinary worldly affairs (and not from s'āstra). It is in this way that the popular convention of ownership in the calf born of one's own cow becomes consistent; but this would not be so if the sources of ownership were to be understood from *s'āstra* alone, since *s'āstra* does not tell us that being born of one's cow is a means (of ownership).

(An objector urges) it would follow that there is ownership over one's sons and daughters since they are born of one's wife, just as (there is ownership in the calf) because of its birth from one's own cow. If it be said that this (that is urged as an objection) is an acceptable proposition, then it would be in direct conflict with the conclusion established in the sixth (chapter of the Pūrvamīmāṅsāsūtra) that, although it would seem to follow that daughters and sons should be given away (in gift), as the gift of one's all is enjoined (by the Veda) 'in the *Vis'vajit* sacrifice one gives one's all', yet daughters, sons and the like (relations) cannot be given (by way of gift in *Vis'vajit*[2]). (This objection) is not (proper), as there being

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1. This embodies an important proposition that the state is not the owner of all lands, but is only entitled to levy a tax.

2. In the Pūrvamīmāṅsā-sutra VI. 7. 1-2 there is a discussion on the vedic text 'in the Vis'vajit &c.', where the conclusion established is that one's parents and so other relations *cannot be gifted* away, but only such *things of which one is absolute* master (*prabhu*). As regards the question whether there is ownership over wife and children the Mit. and Mayukha differ. The Mit. says that there is ownership over one's wife and children (on Yāj. 2. 171), while the Mayūkha repudiates this doctrine. Both, however, are agreed that wife and children cannot be the subject of gift, the Mit. saying that it is so because there are special texts prohibiting the gift of them and the Mayūkha saying that the gift cannot be made because there is no ownership over them, The Vir. follows the Mit. Vide notes to V. M. pp. 127-128. In *Kalgauda* v. *Somappa* 11 Bom. L. R. 797 at p. 812 the words of the Mayūkha 'there being absence of ownership...born of her' are quoted.

* P. 92. (text).

absence of ownership over one's wife while there is (owership) in a cow, there is no ownership over the offspring born of her (the wife); and (further) in worldly experience being born of what is the subject of ownership is alone understood to be the cause of ownership (in the things produced).

If it be urged (as an objection) that there is ownership in the wife also on account of accepting her (at the time of marriage when she is given away[1]), (the reply is that) this objection is not proper, since there being absence of ([2]the privilege of) accepting a gift for kṣatriyas, there will be no ownership over their wives and therefore there will be none even in the children born of them. Therefore (i. e. for this very reason), since it is only a person of the same caste that can be adopted as son on account of the text (of Yāj. II. 133) 'this rule propounded by me applies to (the twelve kinds of) sons that are of the same caste (with their father)', the acceptance of a son in adoption, so far as the kṣatriyas are concerned, can only be in a secondary (or figurative) sense[3]. Nor is it possible to take acceptance (of a son) in the primary sense even as regards brāhmaṇas, since in that case (i. e. if acceptance be understood in the primary sense with brāhmaṇas and in the secondary sense with kṣatriyas) in the texts enjoining that (i, e. adoption of a son) there will be conflict inasmuch as (the same word acceptance) will have been used in two different senses at the same time. Nor can it be said that the rite of acceptance of a son (in adoption) is permitted only to brāhmaṇas and not to kṣatriyas and the rest, since from the words of S'aunaka and others such as 'a daughter's son and a sister's son are given (in adoption) to a s'ūdra', it is understood that they (i. e. kṣatriyas and the rest) are entitled to perform that (the ceremony of adoption). Similarly in the case of the marriage of a brāhmaṇa with the daughter of a kṣatriya (and the like) in the *brāhma* form, both the gift and the accep-

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1. In the Gṛhyasūtras marriage it said to be the *gift* of the bride whose hand the bridegroom accepts. Vide Ās'valāyana Gr. S. I. 6. 1. and I. 7. 3.

2. According to Manu 10. 75 and 77, acceptance of a gift, teaching of the Vedas and officiating as priests in a sacrifice were the peculiar privileges of brāhmaṇas alone.

3. The texts on adoption speak of the *gift* of a son e. g. (Manu 9. 168 'whom the mother or father *gives* with water &c.). A *kṣatriya* can adopt only a kṣatriya according to the text of Yāj. (II. 133.). But a kṣatriya cannot accept a gift. Therefore when it is said that a kṣatriya boy is to be given and accepted by a kṣatriya the word 'acceptance' cannot apply in the case of ksatriya in its primary sense, but only in a figurative sense. The texts that enjoin adoption (like Manu's) are applicable to all castes. Therefore it will have to be said that the same word for acceptance is used in two senses in the sentence, in the primary sense when applying to *brāhmaṇas* and in a figurative sense when applying to kṣatriyas. But this is not a legitimate method, since the Pūrvamīmāṁsā-sūtra (I. 3. 23, I. 4. 8. and III. 2. 1.) says that in one *vidhi* text, the same word cannot be used in two senses. Hence it follows that the word acceptance is used in a figurative sense (in adoption) as regards *brāhmaṇas* as well as ksatriyas. Vide notes to V. M. pp. 120--130. There are three *vṛttis* (functions) of a word, *abhidhā* (primary), *lakṣaṇā* (secondary sense), *vyañjanā* (suggestive sense).

tance (of the girl) would have to be admitted to be in a figurative sense and in other cases (viz. marriage of a brāhmaṇa with the daughter of a brāhmaṇa) both (gift and acceptance) would have to be admitted to be in the primary sense—thus there will be conflict inasmuch as two senses (of the same word in the same rule) will have to be resorted[1] to. That the *brāhma* and other forms of marriage are in vogue among *kṣatriyas* is not disputed by any one[2]. *Therefore the revered Mis'ra (Pārthasārathi-mis'ra) says in his *Tantraratna*[3] that the gift of a son and the like is to be understood in a figurative sense. Nor can it be assumed from the popular use of such language as 'one's own wife, sons and daughters', that there is ownership in them, since (the use) of that word (viz. *sva*) can be also explained as expressing 'relationship' as in 'one's own father, one's own mother' and the like. And the word '*sva*' does possess the power of expressing relationship also, since the lexicon (of Amara) says "*sva* when *masculine is used in the sense of 'relationship' or 'one's self', in all the* three genders in the sense of 'what belongs to one' and when not in the feminine (i. e. in masculine and neuter) it means 'wealth'. As to the

1. This doctrine of the mīmāṁsā is referred to in *Bhimacarya* v. *Ramacarya* 11 Bom. L. R. 654 at p. 661 (=33 Bom. 452), *Tukaram* v. *Narayan* 36 Bom. 339 at p. 356 (F. B.), 6 Cal. 119 at p. 126 (F. B.).

2. The whole discussion is started for showing that there is no ownership in wife and children. Nīlakaṇṭha cites the illustration of an adopted son and argues that there at least the gift of a boy and acceptance are not meant to be literal, but in a figurative sense; similarly in marriage also, the acceptance of a girl by the husband is not like that of a chattel, but is only figurative. If a kṣatriya married a kṣatriya girl in the Brāhma form, he being a kṣatriya is not entitled to accept a gift; so though the essence of the Brāhma form according to Manu (III. 27) and others is the gift of the girl, there can be no acceptance by a kṣatriya in the primary sense. Hence in the daughter born of such a marriage there can be no real ownership (as there is none in her mother). Therefore if a ksatriya gives his daughter in marriage to a *brāhmaṇa*, the gift (*dāna*) is also figurative and therefore the *pratigraha* (acceptance) also is figurative. But if a *brāhamaṇa* gives his daughter in marriage to a *brāhamaṇa*, both gift and acceptance will be in the primary sense. Therefore in the general rule about the *brāhma* form which is applicable to the three classes, the words gift and acceptance would have to be used in two different senses, which is condemned by all rules of interpretation. Hence both gift and acceptanc must be regarded as figurative in all cases of marriage. The author brings in the *brāhma* form, because it might be argued that in the *rākṣasa* form as the girl was forcibly carried away (Manu III. 33) the husband became her owner. Modern decisions also hold that the presumption as regards marriage in the three higher classes and even among respectable S'ūdras is that the marriage is in the *brahma* form. Vide *Jagannath Raghunath* v. *Narayan* 34 Bom. 553 at p. 559.

3. The Tantraratna is a work of Pārthasārathi-mis'ra, wherein he explains passages from S'abara and Kumārila. He flourished before 1150 A. D. and after 900 A. D. as he is quoted by Halāyudha in his Mīmāṅsā-sarvasva and is himself later than Vācaspatimis'ra.

* P. 93 (text).

gift of a person born a slave that is mentioned in the sixth[1] (chapter of the Pūrvamīmāṅsā), that is a questionable proposition, since, there being absence of ownership in his mother, she cannot be in the primary sense the subject of gift, acceptance or sale and therefore there is with greater reason the absence of that (ownership) in the person born of her as a slave. Let this digression pass.

Now (begins) heritage. ***Dāya*** (heritage) means wealth that is not re-united and that is liable to be partitioned. ***Asaṁsṛṣṭa*** (not re-united) is used (in the definition of *dāya*) for excluding (from *dāya*) wealth that is brought together into a common fund for the sake of profit and the like, since the expression *dāyabhāga* (partition of heritage) is not used to denote the division of wealth after it is lumped together by merchants (for trade). Similarly that wealth also which is brought together by the technical re-union that will be explained below (in the section on re-union) is excluded (from *dāya*). Therefore it is said in the ***Smṛtisaṅgraha***:

> Wealth which comes through the father and also that which comes through the mother are described by the word *dāya*; the partition of that (*dāya*) will now be expounded.

And in the Nighaṇṭu (it is said):

> The wise describe as *dāya* the father's wealth that is fit to be[2] divided.

The word *pitṛ* (father) is used (in the above definition of *dāya*) as including all relatives whatever.[3]

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1. In the sixth chapter of Jaimini's sūtra, or in the bhāsya of S'abara thereon or in the Tantravārtika of Kumārila nothing is said about the *garbhadāsa* (the person born of a slave). Nīlakaṇṭha is not probably referring to these original sources, but to some later works. The only place where this subject occurs in the 6th chapter of Jaimini is VI. 7. 6 where the conclusion is that a s'ūdra who, following the rules of smṛti (as in Manu I. 91), serves persons of the three higher castes, cannot be given away by way of gift in the Vis'vajit sacrifice. What is meant by *garbhadāsa* is not quite clear. Nārada (abhyupetyās'us'rūṣā 26-28) speaks of 15 *dāsas*, but the term *garbhadāsa* does not occur therein, Most probably his first variety *gṛhajāta* is the same as *garbhadāsa*. When a person keeps a concubine (*dāsī*) and a son is born of her, he may be styled *garbhadāsa*. But the person who keeps her has no power to make a gift of her or sell her and so the illegitimate son born of her cannot be given away by the putative father. Khaṇḍadeva in his comment on Jaimini VI. 7. 6 does say that '*garbhadāsa* and the like may form the subject of gift in Vis'vajit'. But Khaṇḍadeva is later than Nīlakaṇṭha, who is probably referring to some predecessor of Khaṇḍadeva holding similar views. Vide notes to V. M. pp. 132-33

2. If a person has on only son and then he dies, the wealth is not to be divided and yet it is *dāya*, as it is fit to be divided, though not actually divided. It is not clear what work is referred to as Nighaṇṭu. The passage from the Smṛtisaṅgraha is quoted in *Bai Parson* v. *Bai Somli* 36 Bom. 424 at p. 427 and is explaindd at p. 433, where the Nighaṇṭu also is quoted.

3. The word *pitṛ* is used illustratively and stands for any person from whom property may be inherited on the ground of relationship.

This dāya is of two kinds, ***sapratibandha*** (obstructed) and ***apratibandha*** (unobstructed). That is ***sapratibandha*** where the life of the owner of the wealth or that of his son and the like (i. e. grandson and great-grandson) is an obstacle (i. e. is interposed between the claimant and that wealth), for example, the wealth of the paternal uncle and the like (as regards the nephew and the like) : but where ownership accrues to sons and the like solely by relationship to the owner independently of any other means (source) of acquiring wealth, that is ***apratibandha dāya***, for example, the father's wealth. Here (ends the discourse on) the nature of ***dāya***.

* Now (begins) the partition of that (i. e of dāya). Nārada (p. 188 v. 1) describes it ;

Where a division of the [1]paternal wealth is arranged by the sons, that is called by the wise ***dāyabhāga*** (partition of heritage), which is a title of law (out of the eighteen titles).

Putraiḥ (by the sons) is indicative of (i. e. inclusive of) also grandsons and the like; ***pitryasya*** (of the father) includes (that) of the grandfather and the like. Madana (the author of the Madanaratna) has the reading ***pitryādeḥ*** (for ***pitryasya***) itself (meaning wealth of the father and the like). Here is declared the character of the partition of heritage. Even in the absence of common (family) property, a severance (of interest) does indeed take place also by a mere declaration in the form 'I am separate from thee'; for, severance is merely a particular mode (or state) of the mind and this declaration only manifests that (mode of the mind[2]).

Now (about) the time of partition. Manu says (IX. 104) :

After (the death of) the father and the mother, the brothers, having met together should divide equally the paternal (i. e. ancestral) wealth ; for while (the parents) are alive, they (the brothers) have not power (over it).

Though this particle ***ca*** (and) is used (in the verse above) it is not intended that the death (of both parents) should have taken place (before partition). Hence the ***smṛtisaṅgraha*** (as quoted) in the Madanaratna says :

1. Vide *Yamunabai* v. *Manubai* I. L. R. 23 Bom. 608 at p. 611 for legal incidents of paternal wealth and self-acquired wealth. The verse of Nārada and remarks of the Mayūkha thereon are quoted in *Ponappa Pillai* v. *Pappuvayyangar* I. L. R. 4 Mad. 1 (F. B.) at p. 49.

2. This text declares that an unequivocal declaration of intention to separate effects the severance of a member from the joint family. Vide *Pandit Suraj Narain* v. *Iqbal Narain* L. R. 40. I. A. p. 40. (=35 All 80 at p. 87) for the same proposition. *Soundararajan* v. *Arunachalam* 39 Mad. 159 (F. B.) at p. 169 and *Girjabai* v. *Sadshiv* 43 Cal. 1031 at p. 1046 (=43 I. A. 151 p. 160) in both of which this passage of the Mayūkha is quoted. There are numerous cases on the question as to what constitutes unequivocal declaration of intention to separate and as to the presumptions about the status of other members when one separates. Vide 44 I. A. 159, 19 Bom. L. R. 642. (=39 All 496), 49 I. A. 385 and 168, 50 I. A. 192, 56 Bom. 815 (=28 Bom. L. R. 1446), 51 I. A. 163 (=5 Lahore 92), 52 I. A. 83 (=48 Mad. 254).

* P. 94 (text).

Partition of paternal wealth may take place even when the mother is alive, since the mother in the absence of her lord (the father of the family) has no independent ownership. Similarly partition of the mother's wealth also takes place, while the father is alive, since the husband is not the lord of ***strīdhana*** (woman's peculiar property) when she has her issue living.

Bṛhaspati (p. 369 v. 1.) states an exception[1] to this:

On the death of both parents partition among brothers is propounded (in the texts); it (partition) is declared (i. e. permitted) even when both are living, if the mother is past child-bearing.

*Nārada (p. 189 vv. 2-3) says:

Hence after the (death of) the father the sons should divide equally the (father's) wealth, when the mother is past child-bearing and the sisters have been given away (in marriage), or when the father's sexual desires are extinguished or when the father's interest (in worldly) affairs) has ceased[2].

'Ramaṇa' means 'sexual desire'; ***uparataspṛhaḥ*** means 'become indifferent to worldly affairs'. The clause ***prattāsu bhaginīṣu ca*** (and when the sisters are given away) is (to be taken as) qualifying both ***rajonivṛtti*** (the cessation of menses in the case of the mother) and ***ramaṇanivṛtti*** (cessation of sexual desire in the father) like (the pupil of) the crow's[3] eye. Gautama (28.1–2) says 'After the (death of the) father, the sons may divide (paternal) wealth, or while the father is alive (they may partition) if the mother is past child-bearing or if he (the father) desires (to partition his property[4]).' By the word ***icchati*** (if he desires) it is

1. The exception is contained in the latter half of the verse quoted.

2. This last half of the verse is variously read in the mss. of the Mayūkha and the other *nibandhas* (digests of Law). Vide notes to V. M. p. 134.

3. The popular belief is that the crow has but one eye, which it is supposed to move from one socket to the other as necessity requires. This maxim means that one word or clause, though occurring only once, may be connected with two clauses or serve two purposes. The idea in the above verses is that the proper time for partition is when the mother is past child-bearing or when the father has become indifferent to worldly affairs. *Prattāsu* &c. does not lay down a third time for partition, but simply means that before partition takes place between brothers the sisters should have all been either married or provision should be made for their marriage.

4. This is the meaning according to the Mit. Haradatta the commentator of Gautama says ' though father be alive sons may partition if the mother is past child-bearing and if the father chooses to separate '. Telang J. in his dissenting judgment in *Apaji* v. *Ramchandra* I. L. R. 16 Bom. 29 (F. B.) says (at p. 42) that this text of Gautama and that of Nārada (after the father's death &c.) refer to self-acquired property. The Bombay Full Bench held that a son cannot in the life-time of his father sue his father and uncles for partition of his share in immoveable property and that decision was followed in *Jivabhai* v. *Vadilal* 7 Bom. L. R. 232. The other High Courts hold a view contrary to that of the majority in 16 Bom. 29. Vide 5 All 430 (F. B.), 18 Mad. 179, 31 Cal. 120, 1 Patna 361.

* P. 95 (text).

declared that partition may take place at the choice of the father even if (the mother) be not past child-bearing.

Bṛhaspati (p. 370 v. 2) declares that partition may take place in some cases even against his (i. e. the father's) desire:

The father and sons are equal sharers in houses snd lands that descend hereditarily (i. e. from their ancestors); sons are not entitled to partition against the father's will of their father's (own) property.[1]

The meaning is that it follows as a matter of course that they (sons) can claim partition even against his (father's) will of what was acquired by their grandfather and the like[2]. Even as regards the grandfather's property, Manu (9. 209) and Viṣṇu (Dh. S. 18. 43) declare that partition takes place in some cases only at the pleasure of the father:

If a father recovers the property of his father which the latter could not recover, he (the father), if unwilling, will not have to divide it with his sons, (since) it is his self-acquisition.

* Bṛhaspati (pp. 371–72 vv. 12–13) says:

Over the property of the grandfather seized (by strangers) which was recovered by the father through his own power and over what was acquired by him by his own learning, bravery or the like, the father's ownership has been declared (in the smṛtis), From that wealth he may make a gift or he may enjoy it at his pleasure.

Nārada (p. 193 v. 16) says:—

A father who is afflicted with disease, who is under (the influence of) wrath, whose mind is addicted to sexual desires, who acts contrary to what the *s'āstra* ordains, has no power to make a partition (at his own will).

Hārita says[3] :—

Even when the father does not desire [4]it, partition of *riktha* (ance-

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1. There is great divergence between the Mit. and the Dāyabhāga about the times for partition. The school of the former gives four times for partition: while (1) father is alive at his will; this is (Yāj. II 114.) 2 during fathers life, when mother is past child-bearing or father is indifferent to the world sons may partition even against father's will (in Nārada's words above); 3 in father's life when he is *patita* or quite infirm through old age or suffers from incurable disease (vide Hārīta quoted below); 4 after the father's death (Yāj. II. 117).The Dāyabhāga specifies only two times: (1) when his ownership ceases owing to his being *patita* or indifferent to the world or when he dies and (2) when though living he desires to divide his wealth.

2. In *Jivabhai* v. *Vadilal* 7 Bom. L. R. 232 at p. 235 and *Kaliparshad* v. *Ramcharan* 1 All.159 (F.B.) at p. 161 this text of Bṛhaspati and the Mayūkha's remarks thereon are quoted.

3. This is ascribed to S'aṅkha by the Mit. Aparārka, Parās'ara-Mādhavīya and other works.

4. Mandlik translates ' if the father be free from desire, old' &c. But this is wrong as Nīlakaṇṭha's quotation from Madanaratna and remarks thereafter show.

* P. 96 (text).

stral estate) takes place, if he be old, of perverted mind, or suffers from an incurable disease.

According to the Madanaratna, ***akāme*** means 'when he has no desire to partition'; ***viparītaceta̅ḥ*** means 'who practises ***adharma*** (what is forbidden by ***s'āstra***). The sense of Hārita's sūtra is 'in such cases a partition may take place even if the father does not desire it.'

Hārita declares that a partition may take place with the consent of the eldest son when the father becomes incapable (of managing family affairs): 'Indeed when (the father) is weak (through old age), has gone to a distant land or is afflicted (with deep bereavement or disease), the eldest son may look after the affairs (of the family)'. S'aṅkha and Likhita say: 'when the father is incapable, the eldest (son) should transact the affairs of the family or with his consent, he who is younger than him, if he be conversant with (family) affairs'. ***Anantaraḥ*** means 'one born after him'. The quintessence (of this discussion) is that partition should take place with the consent of him who is able to maintain the family, but that where all are so able, then there is no restriction.

Yājñavalkya (II. 114) says:—

If the father makes a partition he may separate his sons (from himself and among themselves) at his will, giving the eldest the best share or all may be equal sharers[1].

*The latter half of the verse only explains the voluntary partition (contained in the first half),[2] since, when it is possible for the (father's) will to resort to the two alternatives (mentioned in the latter half), it would not be proper that it should be unfettered; for otherwise (i. e. if the father's will were not restricted to either of two alternatives) there would be (the

1. This text and the Mit. thereon are quoted in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* 1 Bom. 561 at p. 568; vide also the same case when it went up to the Privy Council, L. R. 7 I. A. p. 181; vide also *Bapu* v. *Shankar* 28 Bom. L. R. p. 46 (where it was held, after quoting this verse of Yāj., that a father can effect during his life a partition among his minor sons *inter se*; *Kandasami* v. *Doraisami* 2 Mad. 317 at p. 322 (where the Mayūkha is referred to and it is said that a father can in his last illness separate by a document his major and minor sons without consulting their wishes); *Nirman Bahadur* v. *Fateh Bahadur* 52 All. 178.

2. According to the Mit. the father's will may be exercised in two ways only viz. by giving the best share to the eldest (as said in Manu 9. 112) or by giving equal shares to all sons. The Mit. then points out that the first alternative applies only to self-acquired property and the second to ancestral property. The Dāyabhāga on the other hand applies the first half to self-acquired property and leaves the father unfettered discretion to give anything to any son or to give nothing to any son and the second half to ancestral property.

* P. 97 (text)

fault of) the splitting up of a *vākya*[1] (i.e. sentence) and there would follow the fault of uncertainty in that (the father may give) to one son a ***lakh*** (of rupees); to another a ***cowree*** and nothing to a third.

Manu (9. 112, 116–117) speaks of a special provision as regards the separation of the eldest (brother);

> The deduction (from the whole family property) made in favour of the eldest is a twentieth part (of the heritage), besides what is best of all the chattels (of the family); for the middle (brother) it is one-half of that (i. e. it is one-fortieth) and for the youngest it is half of the latter (i. e. one-eightieth of the whole). But if the deduction for these be not made, the following shall be the apportionment of shares. The eldest son should take one share in excess (i. e. a double share), the one born next (after the eldest) a share and a half and the younger sons a share each. This is the settled rule of law.

Manu (9. 126) declares that out of twin brothers he who is born first has seniority:

> In the ***subrahmaṇyā***[2] formula also the invocation (of Indra) is declared (in the s'āstras) to be made by him who is senior in birth; and in naming (or calling) twins seniority is deemed to be due to the (priority of actual) birth. Among[3] twins seniority is established in him whose face on birth is seen first by his parents and kinsmen.

As to what is said in the medical works like the Piṇḍasiddhi that seniority (among twins) belongs to him who is born last, that (opinion of medical works) is set aside by this (i. e. passage of Manu) so far as things to be

1. Vākyabheda is a fault according to the Mīmāṅsā. The rule is that in a single *vākya* there is to be a single *vidhi* and so if in a single *vākya* there are two *vidhis* that is a fault Vide notes to V. M. p. 139 for greater details. If it were held that the first half (of Yāj. II. 114) relates to father's self-acquisition and the latter to ancestral property, there would be two *vidhis* (injunctions) in the same *vākya*, which is not allowable; therefore the first half contains the rule and the second half contains an explanation or amplification of it. Mandlik's translation (p. 41) ' also because such a construction will involve the difficulty of three predicates ' is neither accurate nor clear.

2. The Subrahmaṇyā is a loud invocation addressed to Indra in the *Jyotiṣṭoma* to be recited by the *Adhvaryu* or according to some by the *Subramaṇya* priest, an assistant of the *Udgātṛ*. According to the Kātyāyanas'rautasūtra (I. 3. 1 ff) in this invocation the names of the three paternal ancestors of the *yajamāna* are to be recited and also of his descendants for three generations according to their seniority in birth. Vide notes to V. M. pp. 140-141 for further details.

3. This text is not found in Manu, but is ascribed to Devala in the Vivādaratnākara.

accomplished are concerned [1], since it has no Vedic basis, just as in the case of such passages as 'a man becomes a sūdra at the end of a month' (if he does this or that forbidden act). As* to the passage of the *Bhāgavata*[2] 'then there are two fœtuses and birth takes place in the order opposite to that of conception', whereby (among twins) the one born last is declared to have seniority, that also is set aside by these texts, since in the purāṇas many practices opposed to the smṛtis are met with[3]. Some say that the question (when there is a conflict between smṛti and ācāra) should be settled in accordance with the usage of each country; but what is stated above is alone proper. This partition after a deduction is not desirable in this *kali-yuga* (the present age) since it is enumerated (in the ancient texts) among those things that are prohibited in the Kali age. And this has been (discussed and) settled by me in the Samayamayūkha.[4]

Nārada (p. 191 v. 12) declares that the father gets two shares:

A father making a partition may reserve two shares for himself[5].

But this relates to one having an only son; for in the Madanaratna occurs the following *dictum* of S'aṅkha-Likhita 'if he has an only son, he

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1. The words in the original are 'kāryāṁs'e bādhyate'. Whatever foundation there may be for the theory of medicine so far as actual facts (*siddha* matters) are concerned they have no Vedic support, while the other theory that among twins seniority is by birth has Vedic sanction in the Subrahmaṇyā formula and in Manu. Therefore where Vedic or *smārta* rites are to be performed (*kārya* = *sāddhya*) for securing unseen results (*adṛṣṭa*) the theory of Manu has to be followed and the medical theory may be followed in medicine. The words 'just as &c.' illustrate 'kāryāṁs'e bādha'. Vasiṣṭha Dh. S. II. 27 and Manu X 92 say that a *brāhmaṇa*, if he sells milk becomes a *Sūdra* after three days.' This does not mean that so far as things prescribed by the Vedas to be performed by persons born brāhmaṇas he ceases to be a *brāhmaṇa* (i. e. so far as *kārya* i. e. matters to be done in future are concerned he is still a brāhmaṇa and not a s'ūdra). So that sentence simply censures a brāhmaṇa, but leaves his status as to future actions (kāryāṁs'a) unaffected. Mandlik translates (p. 42) 'that is set aside by the above texts in the matter now under discussion' is not correct, nor is his reading 'he becomes purified after a month' acceptable. Vide notes to V. M. p. 142 for detailed reasons.

2. These words do not occur in the Bhāgvatapurāṇa but in the comment of S'rīdhara on Bhāgavata III. 17. 18, who quotes the passage from Piṇḍasiddhi, about the seniority between Hiraṇyakas'ipu and Hiraṇyākṣa. It is to be noted that Kamalākara, a first cousin of Nīlakaṇṭha, in his Nirṇayasindhu quotes this very passage in the same way as from the Bhāgavata and holds the same opinion. This is probably due to the fact that both were taught together and learnt this from the same teacher.

3. The principle is that each of s'ruti, smṛti and *ācāra* is to be set aside if in conflict with the preceding. Vide Mit. on Yāj. I. 7.

4. The last section of the author's *Samayamayūkha* deals at length with the topic of things forbidden in the *Kali* age. In *Damodardas* v. *Uttamram* 17 Bom. 271 it was held that the eldest brother was entitled to take the family idol and keep it with the property appertaining thereto.

5. According to the Mit. and the Vir. this text applies to self-acquired property.

* P. 98 (text)

may reserve two shares for himself'. In the Pārijāta[1] it is said "the word '*eka*' (in S'aṅkha-Likhita) denotes 'the best', as Amara says that the word *eka* is employed in the sense of 'the foremost', 'another' and 'only' and therefore the meaning (of *ekaputra* in Sa'ṅkha-Likhita) is 'if he has a son possessed of good qualities."

Bṛhaspati (p. 370 v. 3) declares that, as regards wealth acquired by the grandfather, (the father) is entitled only to an equal share even with an only son :[2]

In wealth acquired by the grandfather, whether moveable or immoveable, father and son are declared to be takers of an equal share.

Yājñavalkya (II. 121) says:

In land &c. (translated above p. 78*).

Kātyāyana says:

When the fathers and the brothers take in equal shares all the wealth whatever (that the family owns) that is said to be a righteous partition.

*As for the text of Yājñavalkya (II. 116)[3]

A partition made by the father among (sons) separated by giving them greater or smaller shares, if according to dharmas'āstra, is valid.

Madana, Vijñānes'vara and others say that it means that if (the partition) made by the father be according to dharma (i. e. dharmas'āstra) it cannot be set aside. As to the text of Nārada (p. 192 v. 15)

To those that were separated by the father himself with equal, lesser or greater (shares of) wealth, that (partition) alone is lawful since the father is the lord of all

That text relates to another (i. e. a former) *yuga*.

In the case of the allotment of equal shares to himself (i. e. to the father) and his sons Yājñavalkya (II. 115) declares a share for the wife also:

If he makes the shares (of himself and his sons) equal, his wives to whom no strīdhana was given by their husband (i. e. by himself) or their father-in-law should be made partakers of an equal share.

1. There are several works called Pārijāta. The Vivādaratnākara (p. 466) quotes this very view from Pārijāta. Therefore the work must be earlier than 1300 A. D. It appears from the Vir. (p. 566) that it is the Vyavahārapārijāta that is referred to by Nīlakaṇṭha. For the various interpretations of this sūtra vide notes to V. M. pp. 143--144.

2. This verse of Bṛhaspati is quoted in *Jugmohandas* v. *Sir Mangaldas* 10 Bom. 528 at p. 547 and it was said that there was no distinction between moveable and immoveable property as regards the son's right to demand partition.

3. This verse literally means 'a partition if made by the father giving smaller or greater shares (to his sons) is valid'. The Mit. interprets it by introducing certain words, which the Mayūkha also introduces. The Dāyabhāga takes the literal meaning and allows the father to make an unequal distribution of his self-acquired or ancestral property. *Dharmya*, according to the Mit., means 'allowed by the s'āstras' and refers only to the deduction allowed by Manu to the eldest.

* P. 99 (text).

But if (strīdhana) has been given, one half (of a share) should be given (to the wife or wives), since there is a text (Yājñavalkya II. 148) 'but if (strīdhana) has been given, one should allot half'[1]. ***Ardham*** means 'as much as would, together with the strīdhana already given, be equal to the share of a son'. But no share (should be allotted) to that (wife) whose (***strīdhana***) wealth is already in excess of the share (that might justly be hers).

The same author (Yājñavalkya II. 116) speaks of the absence of a desire to take a share of the heritage on the part of a son who is able to earn and who does not covet (a share):

The* separation of one who is able (to earn wealth) and who does not desire (a share in ancestral wealth) should be effected by giving a trifle.

In the Mitākṣarā it is said that the giving of a trifle is (prescribed) for the purpose of preventing his sons from claiming (later on) a share in the heritage.[2]

In another smṛti (Yāj. II. 117) the allotment of equal shares at a partition after the death of the father is declared:[3]

The sons (i. e. the brothers) should, after the death of the parents, divide equally the paternal wealth and the debts.

Hārita says 'when the father is dead, the partition of ***riktha*** (paternal wealth) is equal.'

Yājñavalkya (II. 123) says:[4]

When the sons divide after the death of the father, the mother also should receive an equal share.

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1 This is said with reference to the giving of *ādhivedanika* strīdhana to a wife when she is superseded by the husband's marrying another woman. *Ardha* means a portion not an exact half. In *Jairam* v. *Nathu* 31 Bom. 54 (it was held in a suit by a Hindu against his father and brothers that the step-mother was entitled to a share equal to that of a son but that from her share must be deducted the value of the *strīdhana* received by her from her father-in-law or husband). Vide also *Hosbanna* v. *Devanna* 48 Bom. 468 and *Hushensab* v. *Basappa* 34 Bom. L. R. 1325 where, after referring to the Mayūkha, it is said that the mother is entitled to a share on a partition during the father's life-time as well as after his death.

2. Vide *Fakirappa* v. *Yellappa* 22 Bom. 101 (where after a grandson separated from his grandfather and uncles the grandfather died leaving self-acquired property, it was held that the sons who remained joint with the deceased were entitled to the whole of the self-acquired property and that the separated grandson could take nothing.)

3. This remark and the verse of Yāj. (II. 117) and the text of Hārīta are referred to in *Patil Hari* v. *Hakamchand* I. L. R. 10 Bom. 363 at p. 366.

4. These words (of Yāj. (II. 123) are quoteds in *Beti Kunwar* v. *Janki Kunwar* 33 All. 118 at p. 121 and it is said 'this in our opinion implies an *actual division* of the family property i. e. a complete partition under which there is a division of interests as well as separate possession. We do not think that a *mere severance* of interest confers on the mother a right to a share equal to that of each of the sons'. Vide 50 All. 532 at p. 534 for criticism of Colebrooke's translation of this verse.

* P. 100 (text).

Viṣṇu (Dh. S. 18. 34) says ' mothers are entitled to shares in accordance with the shares taken by their sons '. In another *smṛti* (it is said):

> The mother who has no (*strīdhana*) wealth (of her own) should take on a partition a share along with the sons.

The meaning is that a mother who is possessed of (strīdhana) wealth should receive only so much as will bring up her wealth (strīdhana) to an equality with the son's share[1]; while (a mother) whose (strīdhana) wealth exceeds the share (of a son) will not be entitled to a share.

Vyāsa speaks of a share (being given) to the step-mother and the paternal grand-mother :

> The sonless wives of the father are declared equal sharers and so also the paternal grandmothers; all of them are declared to be equal to the mother.[2]

By the word *sarvāḥ* (all), the co-wives of the paternal grandmother also are included.

Yājñavalkya (II. 120) describes the mode of partition among the sons of several brothers :

> Among persons (claiming) through different fathers, the assignment of shares is according to the fathers.

The meaning is that, where (for example) one (father) has a single son, another has two and a third has three, the division (among these six cousins) takes place by (reference to) the fathers only and not by

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1. This remark is referred to in *Savitribai* v. *Laxmibai* I. L. R. 2 Bom. 573 (F. B.) at p. 584 (where it is said that a woman's strīdhana is to be taken into account n awarding maintenance to her).

2. This text of Vyāsa and the two verses of Yāj. quoted above (II. 115 and 123) were elaborately discussed in the recent Bombay case, *Jamnabai* v. *Vasudev* 33 Bom. L. R. 48 (= 54 Bom. 417), where following *Sheo Narain* v. *Janki Prasad* 34 All. 505 (F. B.) at p. 509 it was held that in a partition between a Hindu father (governed by the Mitākṣarā) and his son, the grandmother (i. e. the father's mother) is not entitled to a share and that the text of Vyāsa might entitle the grandmother or step-grand-mother to a share when there was a partition between her grandsons (as was held in *Vithal Ramkrishna* v. *Prahlad Ramkrishna* I. L. R. 39 Bom. 373 at p. 381 = 17 Bom. L. R. 361 and in *Kanhailal* v. *Gaura* 47 All. 127) or between collaterals o different degrees as in *Babuna Kunwar* v. *Jagat Narain* 50 All. 532 (where the grand-mother was given a share when the partition was between her son and a grandson by another son) or in *Sriram* v. *Haricharan* 9 Patna 338. In *Krishna Lal Jha* v. *Nandeshwar Jha* 4 Patna L. J. p. 39 the Court relying on the interpretation of Vyāsa's text given in the V. R. and V. C. dissented from 34 All. 505 (F. B.). Vide also 8 Cal. 649 and 31 Cal. 1065 for an interpretation of Vyāsa's text which differs from the recent Bombay ruling. Vide 2 Bom. 494 at p. 504 and 573 (F. B.) at p. 582 and 17 Bom. 271 at pp. 286--287 for quotation of Vyāsa as to the share of the mother.

*(reference to) the number of the sharers.[1] Kātyāyana says:

> If an undivided younger brother dies, he (the elder) should make the the son of the former a partaker of the riktha (ancestral wealth), when he has not obtained livelihood (share of the heritage) from his paternal grandfather. But he should obtain from his paternal uncle or from the paternal uncle's son the share of his father (i. e the share that would have been his deceased father's if alive). That very share (i. e. a similar or equal share) would be according to law the share of all the brothers. Or even his son would receive a share; beyond that[2] (i. e. the great-grand-son) there is cessation (of the right to share in ancestral wealth).

The word *anuja* (younger brother) is illustrative and includes even the elder brother. *Parataḥ* (beyond) means ' (beyond) the great-grand-son.' The son and the like of the great-grandson do not obtain the wealth (of the great-great-grand-father) when the father, the grand-father and the great-grand father die (first) and then the great-great-grand-father dies and the latter's sons and the like are alive; if no son, nor grandson, nor great-grandson whatever exist, even he (the great-great-grandson) does take (the inheritance); this is the meaning. This (text of Kātyāyana) does not refer to the undivided (coparceners) but to those that are re-united,[3] since Devala says:

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1. That is the division is *per stirpes* and not *per capita*. In *Manjanath* v. *Narayana* 5 Mad. 362 at p. 364 it is said that the rule about division *per stirpes* is laid down with reference to cases in which all the coparceners desire partition at the same time and that it ought not to be applied indiscriminately to cases of partial partition. In *Nagesh* v. *Gururao* 17 Bom. 303 Telang J. says that succession *per stirpes* is a special rule in partition based on a special text and that inheritance among remoter *Gotraja* sapiṇḍas goes *per capita* and not *per stirpes*. Vide *Narasappa* v. *Bharmappa* 45 Bom. 296 (where first cousins were held entitled to take *per capita* and not *per stirpes*) and *Kallava* v. *Vithabai* 32 Bom. L. R. 995 (where it was held that widows of gotraja sapiṇḍas inherit per capita and not per stirpes).

2. This means "the son of the grandson of the man whose wealth is to be divided". The idea is that the son of the great-grandson is not entitled to a share on partition when the *propositus* dies leaving a son, grandson or great-grandson. Vide notes to V. M. pp. 147-148 and Kātyāyana vv. 855-856. These verses are lucidly explained in *Moro* v. *Ganesh* 10 Bom. H. C. R. 444 (at pp. 461, 466-67) and are quoted in *Debi Prasad* v. *Thakur Dial* 1 All. 105 (F. B.) at p. 111.

3. Why Nīlakaṇṭha takes this passage in this sense it is difficult to say. Kātyāyana starts with the words ' when a younger brother dies undivided ' and there is nothing to show that the topic has changed to that of reunion. Probably Nīlakaṇṭha thus construes in order to harmonise his meaning of Devala's verse with Kātyāyana's. Devala uses the words ' again ' and 'up to the fourth', which correspond with 'beyond that there is cessation'. Nīlakaṇṭha's interpretation of Devala is forced and irrelevant. Vide notes to V. M. p. 148. This is a forced construction of the word *avibhakta-vibhaktānām*. It should be taken as a *dvandva* meaning ' of those who are undivided and those who are divided ' and not as a karmadhāraya as Nīlakaṇṭha seems to have done.

* P. 101 (text).

Among members of the same family who being once undivided became divided and then began to live together (i. e. reunited) there may be partition again up to the fourth in descent (including the propositus); this is the established rule.

If a debt, a document, a house, a field be the property of a person's grandfather, he, though he may have gone abroad for a long time, is entitled to a share in it when he returns. If a person leaves the country common to his family (and himself) and resorts to another country, there is no doubt that a share must be given to his descendant when he returns (Bṛhaspati p. 373 vv. 23-24).

* ***Avibhaktavibhaktānām*** (in Devala) means 'the great-great-grandfather and his sons who are reunited.'[1] This (text of Devala) refers to those who live in the same country. A fifth in descent and the like also do take (a share in the heritage) when they live in another country, since the *smṛti* of Bṛhaspati (p. 373 v. 25) when treating of residence in a foreign country says:

Even he who is third, or fifth or seventh (from the propositus) may receive his share descending hereditarily on his birth and family name being ascertained.

Bṛhaspati (p. 372 v. 15) speaks of a partition according to mothers in some cases:

If there be many (sons) sprung from the same (father), who are equal in caste and number, they may make on account of their being born of rival mothers a legal partition according to the mothers.[2]

Vyāsa says:

If there be sons who are sprung from one (father), who are equal in caste and number, but have different mothers, a division according to mothers is commended.

Bṛhaspati (p. 372 v. 16) cites an example opposite of this:

Among (sons) who are of the same *varṇa* (class) but differ in number (i. e. a different number of sons is born to each wife), a division according to the males (entitled to share) is commended.

Yājñavalkya (II. 125) speaks of partition among sons of (mothers of) different castes:

The sons of a brāhmaṇa get respectively four shares, three, two and one; those born of a kṣatriya get three, two and one; while those

1. This explanation should really have come before the verses ' If a debt &c '.

2. When the sons are of the same caste and equal in number, though born of different mothers, no difference will result as to the share of each son whether there be a division with reference to the mothers or without. But the text speaks of division through mothers here simply to give prominence to them.

* P. 102 (text).

born of a Vais'ya two shares and one respectively.[1]

**Brāhmaṇātmajāḥ* means ' born (to a brāhmaṇa) of (wives of the) brāhmaṇa, kṣatriya, vais'ya and s'ūdra castes'; *kṣatrajāḥ* means ' born (to a kṣatriya) of wives of the kṣatriya, vais'ya and sūdra castes'; and *viḍjāḥ* meane 'born of wives of the vais'ya and s'ūdra castes.'

Bṛhaspati (p. 374 v. 30) says:

> Land obtained by the acceptance (of a gift) should not be given to the son of a wife of the kṣatriya or other (inferior) caste. Even if their father give it to them, the son of the wife of the brāhmaṇa caste should resume it on the death (of the brāhmaṇa father).

Devala says:

> A son begotten on a wife of the s'ūdra caste by a person of the (three) regenerate castes is not entitled to a share of land; but one born on a wife of the same caste (as that of the father) would get all (including land); this is the settled law.[2]

Bhūmeḥ means ' (of land) though acquired even by purchase and the other modes'; but of chattels he (son begotten on a s'ūdra wife by a man of the regenerate classes) does get a share. The son, however, born of a s'ūdra woman not married (to the putative father) does not obtain a share even of chattels. And likewise Manu (9·155) says:

> The son of a brāhmaṇa, kṣatriya and vais'ya from a s'ūdra woman is not entitled to (a share of) the heritage; whatever wealth his father may give him, so much alone belongs to him.

Bṛhaspati[3] (p. 374 v. 31) lays down a special rule after the death of the father;

> An obedient and meritorious son born from a woman of the s'ūdra caste to a man who has no other child should get maintenance; the sapiṇḍas (of the deceased) should get the rest in equal shares.

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1. According to Manu III. 13 a brāhmaṇa could marry a woman of his own caste or of any one of the other and lower three *varṇas* and so on with the kṣatriya and the rest. In *Rahi* v. *Govind* 1 Bom. 97 at p. 112 this text of Yāj. and the explanation of the Mayūkha are referred to and it is said that the marriage by the higher castes of girls of lower castes is a luxury forbidden to the twice-born classes since the Kaliyuga commenced and that 'this is one of many instances in which comparatively modern writers on Hindu Law discussed, with as much zest as if it were living law, doctrines which in the lapse of time had become obsolete'. But in *Bai Gulab* v. *Jivanlal* 46 Bom. 871 this passage of the Mayūkha (at p. 881) is relied upon as one reason for holding *pratiloma* marriages valid in modern times. In *Natha* v. *Chotalal* 32 Bom. L. R. 1348 the marriage of a brāhmaṇa with a s'ūdra female was held to be valid and the son born of such an union was declared entitled to inherit $\frac{1}{10}$th of the estate of his father as well as his uncle. Vide notes to Kātyāyana vv. 863--864 for a brief criticism of this last case.

2. In *Rahi* v. *Govind* I. L. R. 1 Bom. 97 it said at pp. 106 and 112 that Devala's text refers to s'ūdra women who are married to men of higher castes.

3. This text of Bṛhaspati and the following one of Gautama are referred to in 7 Mad. 407 at p. 412 and in *Rajaninath* v. *Nitai* 48 Cal. 643 (F. B.) at p. 686 (also translated).

* P. 103 (text).

Gautama (28·37) says 'even the son of a s'ūdra woman born to a man who has no other child gets, if obedient, provision for his maintenance.' *Vṛttimūlam* means 'source of livelihood'. The same author (Gautama Dh. S. 28·43) says 'sons born in the reverse order (i. e. born of a woman of higher caste from a man of lower castes) are treated like the son begotten on a s'ūdra woman (by a member of the three higher castes).' *Pratilomāḥ* are persons born of women who are of higher castes as compared with the caste of the begetter.

Yājñavalkya[1] (II·133–134) states a special rule as regards one who is begotten by a s'ūdra on a woman (of the same caste) not married to him:

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1. These verses of Yāj. have been the subject of numerous decisions in all the Indian High Courts. In *Rahi* v. *Govind* 1 Bom. 97 these verses are translated (at p. 102) and it is said that the dāsīputra is entitled to half the share of a legitimate son, that if there be no legitimate son or legitimate daughter or son of such daughter the *dāsīputra* takes the whole estate and that if there be a legitimate daughter or such daughter's son the illegitimate son would take only half the share of a legitimate son and such daughter or daughter's son would take the residue. Yāj. does not mention the widow and the court thought in 1 Bom. 97 that she was excluded (being only entitled to maintenance) when in competition with the dāsīputra along with the legitimate daughter or her son. In *Sadu* v. *Baiza* 4 Bom. 37 (F. B.) it was decided that a legitimate son and an illegitimate son of a s'ūdra could form a coparcenery and that if the legitimate son died, then the illegitimate son would succeed to the whole of the coparcenery property, even though the widow and daughter of the s'ūdra father were living. In *Raja Jogendra Bhupati* v. *Nityanund* L. R. 17 I. A. p. 128 the decision in 4 Bom. 37 that the legitimate son and illegitimate son of a s'ūdra can form a coparcenery and that the latter would by survivorship take the whole property was approved as to an impartible *raj*. Vide also *Vellaiyappa* v. *Natarajan* 33 Bom. L. R. 1526 (P. C.). There was an *obiter dictum* in 4 Bom. at p. 52 that if a s'ūdra died leaving only a widow, daughter and dāsīputra, the latter would take $\frac{1}{3}$, the daughter $\frac{2}{3}$ and the widow would be entitled to maintenance only, and that this was one of the arbitrary arrangements which are not uncommon in Hindu Law (p. 56). But in *Shesgiri* v. *Giriava* 14 Bom. 282 and *Ambabai* v. *Govind* 23 Bom. 257 at p. 265 this remark about the exclusion of the widow of a s'ūdra when an illegitimate son exists is doubted. In *Meenakshi Anni* v. *Appakutti* 33 Mad. 226 it is said that the illegitimate son of a separated childless s'ūdra would succeed as co-heir with the latter's widow, daughter or daughter's son. In L. R. 50 I. A. p. 32 (= 46 Mad. 167 = 25 Bom. L. R. 577) it was held that, where a s'ūdra died leaving his widow and an illegitimate son, each took one-half of the estate. Another important matter is the meaning of the word dāsī. The Bombay decisions have held that dāsī is not to be taken in the strict literal sense (a female slave), but means a woman kept as a concubine, the connection being continuous and lawful. It must be shown that the connection between the s'ūdra man and the woman was not incestuous or adulterous in order that the illegitimate son might inherit Vide *Rahi* v. *Govind* 1 Bom. 97 at p. 110, *Sadu* v. *Baiza* 4 Bom. 37 (F. B.) at p. 44, *Vithabai* v. *Pandu* 28 Bom. L. R. 595 (where the son of a married woman from a s'ūdra was held not to be a *dāsīputra capable* of inheriting even though the husband of the woman connived at the connection). Vide 39 Mad. 136 (F. B.) for an elaborate examination of this question particularly at pp. 152--159. In that case the son of a woman who was at one time a dancing woman and followed the profession of a prostitute and who subsequently became a

*Even a son begotten by a s'ūdra on a dāsī (a concubine) may partake of a share at the choice (of his father). But, when the father is dead, the brothers should make him the recipient of a half share.

Kāmaḥ means 'the desire (or choice) of the father.' On account of the word ***s'ūd. ena*** (by a s'ūdra) it follows that one who is begotten on a ***dāsī*** by (a member of) the regenerate classes is not entitled to a share even at the father's choice, nor to a half share after the father's death nor to the whole in the absence of (legitimate) son and the like. This is according to the Madanaratna and others.

Gautama (Dh. S. 28. 27) states a special rule about a son born after a partition has taken place 'the son born after partition takes only his father's

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concubine in the exclusive keeping of a s'ūdra was held entitled to get his proper share in joint family property. It was observed in that case at p. 151 that the limitation as to the woman being in the exclusive and continuous keeping of the man was not to be found in the texts but was imposed by the courts, just as the further restriction that the connection must not have been incestuous or adulterous was imposed on general grounds of morality. The latest case is *Tukaram* v. *Dinkar* 33 Bom. L. R. 280, where it was held that even though the concubine be a widow or even if the connection in its inception be adulterous it did not matter, provided the illegitimate son was born at a time when the connection had ceased to be adulterous. It is not necessary in order to entitle a dāsīputra to inherit to a s'ūdra that a marriage could have taken place between the putative father and the mother according to the custom of the mother's caste (vide 9 Mad. 136 F. B.). The illegitimate son of a Hindu by a Mahomedan mistress was not held entitled to succeed to the property of the deceased (vide *Sitaram* v. *Ganpat* 25 Bom. L. R. 420 following 27 Mad. 13). In Calcutta the earlier cases (1 Cal. 1, 19 Cal. 91, 28 Cal. 194) held that dāsī meant a female slave and as slavery was abolished in British India there could be no *dāsīputra* properly so called and that that word cannot mean the son of a kept woman or a continuous concubine. But a Full Bench decision in *Rajaninath Das* v. *Nitai Chandra* 48 Cal. 643 (F. B.) holds that the Bombay view of the meaning of dāsīputra is the correct one and has overruled the earlier Calcutta cases. It has been held that a *dāsīputra* does not succeed collaterally in his putative father's family (vide 25 Mad. 429, 44 Bom. 185) nor do the descendants of the father succeed collaterally to the dāsīputra (46 Bom. 424). In *Bhikya* v. *Vedu* 32 Bom. 562 it was held that *dāsīputra* does dot include the illegitimate daughter of a s'ūdra (vide also 50 Mad. 340 at pp. 345 and 350). There is divergence of opinion as to what is meant by 'recipient of half a share'. In *Chellammal* v. *Ranganathan* 34 Mad. 277 it was held that the half share is half of what the legitimate son actually takes and that where there were 4 illegitimate sons and 3 legitimate sons, each of the former took $\frac{1}{10}$ and each of the later $\frac{2}{10}$ths. In *Gangabai* v. *Bandu* 40 Bom. 369 it was held following 34 Mad. 277 that where a s'ūdra died leaving a legitimate daughter and an illegitimate son, the former took $\frac{2}{3}$ and the latter $\frac{1}{3}$ of the whole estate. But in *Kamulammal* v *Viswanathaswami* 50 I. A. p. 32 (= 46 Mad. 167 = 25 Bom. L. R. 577) the Privy Council held that the Bombay view in 40 Bom. 369 was not based on texts and commentaries, but on case law and that if a s'ūdra died leaving a widow and an illegitimate son each would take a half of the estate, as the illegitimate son is to take half of what he whould have taken if he were a legitimate son. Vide 48 Mad. 1 at p. 226 for the same proposition.

* P. 104 (text).

(share) '. Bṛhaspati[1] (pp. 372--373 vv. 19--20) also says :—

Whatever a father, who has separated from his sons, himself acquires, all that belongs to the son born after partition; those born before (partition) are declared to have no right (to it) As with wealth, so with regard to debts, gifts, pledges and sales they (i.e. father and separated son) are independent of each other excepting impurity (on death etc.) and the offering of libations of water (to the dead).

But if[2] there be only debts (and no property left by the separated father), he (i. e. the son born after partition) should not at all pay (his father's) debts, unless he secures a share (of property) from those (his brothers) who separated before (his birth), since it will be stated (later on) 'one who receives *riktha* (ancestral wealth) should be made to pay the debt' (Yāj. II. 51). If (the father) be re-united (after partition) with some one (out of the sons separated from him), then (the son born after partition) divides (his father's wealth) with him (the son re-united), since Manu (9. 216) says :—

The son[3] born after partition is entitled only to the property of his father or he should divide it with those who might have become re-united with him (the father).

*Yājñavalkya (II. 122) makes special provision for the case, where the mother, a step-mother or a brother's wife was pregnant at the time of partition after the father's death but the fact was not evident (at the time of partition) and a son was born afterwards :

After[4] the sons have separated, if a son be born (to the deceased father) from a wife of the same class, he is entitled to a (fresh) partition (with the already separated sons).

And the partition is to be so made by all the brothers and the rest contributing a little out of their respective shares that the share (of the after-born son) will be equal to that of each of them Viṣṇu (Dh. S. 17. 3) says

1. The first verse of Bṛhaspati is quoted in *Nawal Singh* v, *Bhagwan Singh* 4 All. 427 at p. 429.

2. Mandlik's translation (p. 47) ' the previously separated son is not at all bound to pay debts without receiving a share of the heritage' is entirely wrong.

3. This verse is quoted in 4 All. 427 at p. 429.

4. The Mayūkha applies this verse to a case where the father having died and the mother's or step-mother's pregnancy being not known, the sons separate and then a son is born. The Mit. applies it to a partition during father's life-time when the mother's pregnancy was not known and then the father died and a posthumous son was born. The Mayūkha follows the Smṛticandrikā and the Vivādaratnākara. If the son were born from a wife of another class, he would take his proper share from wealth left by the father. In *Ganpat* v. *Gopalrao* 23 Bom. 636 at p. 643 it is said ' the somewhat vague texts of Viṣṇu and Yājñavalkya which direct separated brothers to give a share to an after-born son apply to sons who have no provision made for them and have further been explained by commentators as applicable only to the case of posthumous sons. '

* P. 105 (text).

'those who separated from their father should give a share to the son born after partition'. And this rule of Viṣṇu must be understood to be applicable to the shares after taking into consideration the outgoings (the expenditure) and incomings (the accretions or profits[1]). In case of existence of these (expenditure and accretions) the same auther (Yāj. II. 122) says :—

The allotment of a share to him (to the after-born son) should be made out of (the estate) existing as correctly found after allowing for income (accretions) and expenditure.

Dṛs'yāt (*from the visible wealth*) means 'out of the property that exists'.

Vasiṣṭha (Dh S. 17. 40--41) speaks of a special matter at the time of partition among brothers 'Now (begins) the partition of heritage among the brothers. (They should wait) until those women (patently pregnant wives of their brothers) who have no issue are delivered of sons'. The words 'waiting should be observed' are to be understood (after the sūtra of Vasiṣṭha).

Bṛhaspati (p. 373 v 21) lays down a special rule about partition after the father's death.

If there be younger brothers whose purificatory ceremonies have not (all) been performed, their purificatory ceremonies must be performed by the elder brother himself out of the common paternal wealth.

The form ***yavīyasaḥ***[2] (younger) wherein ***num*** (i. e. ṁ after the penultimate vowel) and the long ā are absent is irregular after the manner of Vedic usage. The mention of the word *bhrātṛ* in (Bṛhaspati's text) is illustrative and includes sisters. And the same author[3] says:

*And those daughters (of the deceased father) whose (marriage) ceremonies hove not been (already) performed should have their (marriage)

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1. That is, proper expenditure made from their shares by each of the brothers is to be deducted. The translation of Mandlik (p. 48) 'this has reference to shares neither increased nor diminished by profit or loss' is wrong, particularly as he reads *'rekasekasahiteṣu'* and not —'rahitesu'. Viṣṇu made no reference to the deduction of expenditure and the addition of profits. Therefore the Mayūkha had to say 'this rule must be understood' &c. while Yāj. is explicit about them and so the Mayūkha says '*tatsatve tu* &c.' In *Chengama* v. *Munisami* 20 Mad. 75 at p. 77 Yāj. II. 122 is quoted and it was held that, where the father divided joint family property among his sons and left no share for himself and a son was subsequently born to him, that son could sue for partition of his share in the property divided together with its accretions.

2. The regular form is *yavīyāṁsaḥ* according to Pāṇini VI. 4.19 and VII. 1. 70. Generally sixteen *saṁskāras* are enumerated. According to Yāj. I. 13 they were intended for purification. For males *upanayana* and marriage and for females marriage ere the most important.

3. But Aparārka, Vir. and others attribute this vevse to Vyāsa.

* P. 106. (text).

ceremonies performed by their elder brothers according to the prescribed rites out of the paternal wealth itself.

Yājñavalkya (2. 124) states a special rule as regards the ***saṁskāras*** (marriages) of sisters :—

(The brothers) whose purificatory ceremonies have not been performed should have their ceremonies performed by those brothers whose ceremonies have been already performed and the sisters also (should have their marriages performed) by allotting to them a fourth share out of the shares of the brothers.

The sense is that sisters should have their marriages performed by giving to each of them a fourth part of such share as would belong to a son of the class to which the sister belongs.

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1. What ceremonies are obligatory and included in the word ' saṁskāra ' is a matter on which there was a sharp difference of opinion between Bombay and Madras. In *Govindrazulu* v. *Devara Bhotla* 27 Mad. 206 it was held that the absolutely necessary ceremonies in the case of males end with *upanayana*, that marriage is not an absolutely necessary ceremony in the case of males and that a sale of joint property for raising mony for the marriage of a male coparcener was not a legal necessity. But this was dissented from in *Sundrabai* v. *Shivnarayan* 32 Bom. p. 81, where it was held after quoting (at p. 86) the verse of Bṛ. ' if there be younger brothers &c. ' that the word ' saṁskāra ' ordinarily includes marriage. *Kamesvara Sastri* v. *Veeracharlu* 34 Mad. 422 followed 32 Bom. 81 and *G. Gopalkrishnan* v. *S. Venkatanarasa* 37 Mad. 273 (F. B.) overruled 27 Mad. 206. In *Jairam* v. *Hari* 31 Bom. 54 (where a suit was brought by a Hindu against his father and brother for partition) it was held that the brothers are entitled to have set apart from the family property a sum sufficient to defray the expenses of their prospective thread, betrothal and marriage expenses calculated according to the extent of the family property, but that brothers' children are not so entitled. Vide also *Shrinivasa* v. *Thiru-vengada* 38 Mad. 556, *Gopalam* v. *Venkataraghavulu* 40 Mad. 632 (where it was held that provision should be made for the marriage expenses of unmarried members at a partition, but only for those who are of the same degree of relationship as those who have been married at the family expense). But in *Narayan Annavi* v. *Ramlinga* 39 Mad. 587 it was held that an unmarried coparcener is not entitled to have an anticipatory provision for the expenses of his future marriage at a partition and when the same case went to the Privy Council (in 45 Mad. 489 P. C.=49 I. A. 168) the same principle was affirmed. 5 Lahore 375 follows 45 Mad. 489 and 53 Mad. 84 distinguishes it. In 29 Bom. L. R. 1412 it was held that the earlier Bombay cases (such as 31 Bom. 54) must be regarded as overruled by 45 Mad. 489 (P. C.) and in 30 Bom. L. R. 457 the court held itself bound to hold on account of the P. C. decision that at a partition it is not permissible to provide for the marriage expenses of unmarried members. It is submitted with the greatest respect that the attention of their Lordships of the Privy Council was not invited to the express texts of Bṛhaspati and Yāj. (II. 124) cited in the Mayūkha and that at some future day their Lordships would reconsider the whole law if the matter comes before them again. There is no doubt as regards the liability of the brothers to provide for the marriage expenses of their unmarried sisters when they come to a partition : *Chedalavada Subbayya* v *Chedalavada Ananda Ramayya* 53 Mad. 84 (= 57 M. L. J. 826 F. B.) where it was held that in a partition between a Hindu father and his sons, the sons are liable for the future marriage expenses of their unmarried sisters in proportion to their shares of the property divided. In *Bhagavati Shukut* v *Ram Jatan* 45 All 297 at p. 299 ' the quarter share ' for the sister is explained as meaning ' as much as will suffice for her marriage '.

Yājñavalkya (II. 128--132) sets out a scheme of sons, principal and secondary, as it is of use in settling the taking of the heritage:

> The ***aurasa*** is one who is begotten on the lawfully wedded wife; equal to him is the ***putrikāputra***[1]; the kṣetraja (the son of the wife) is one who is begotten on a person's wife by an agnatic kinsman or by a non-agnate; that is declared a ***gūḍhaja*** (secretly born) son who is secretly born in one's house; ***kānīna*** is one born of a maiden and is considered the son of the maternal grandfather; ***paunarbhava*** (son of a ***punarbhū***) is said to be one who is begotten on (a married woman) whether the marriage had been consummated or not; that is ***dattaka*** (a son adopted) whom his mother or father gives (away in adoption): a ***krīta*** (bought) is one who is sold by them (i. e, by the parents); a ***kṛtrima*** is one who is made (a son) by the man himself; the ***svayam-datta*** is one who gives himself away (in adoption), a ***sahoḍhaja***) is one who was in the womb (when his mother was married); he is an ***apaviddha*** son who, having been abandoned (by his parents), is received (in adoption by another).[2]

The ***aurasa*** son begotten on a lawfully wedded wife of the same caste (as the husband's) is the principal (or primary) son. The ***putrikāputra*** is of two kinds, the first of which Vasiṣṭha (17.17) describes:

> I shall give to you (in marriage) this maiden decked with ornaments who has no brother; the son who may be born of her will be my son.

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1. We saw above (p. 96) that if a brāhmaṇa has wives of different castes, the sons of the wife of the brāhmaṇa caste are entitled to four shares, those of the wife of the ksatriya caste to three and so on. This rule says that the daughter of a brāhmaṇa from a brāhmaṇī wife would be entitled to one-fourth of what her brother born of a *brāhmaṇī* wife would get on a partition, the daughter of a brāhmaṇa from a kṣatriyā wife would be entitled to one fourth of what her brother born of a *kṣatriyā* wife would get. Another matter of controversy is as to the exact meaning of 'a fourth share'. The Mit. relying on Manu 9.118 and Yāj. II. 124 remarks that a fourth share as above described was to be given to the unmarried sister. The same was the view of Asahāya and Medhātithi. But Bhāruci, the Dāyabhāga, the Smṛticandrikā, Vivādratnākara, Halāyudha and others held that the sister was only entitled to a provision for marriage and not to an exact one fourth. Vide notes to V. M. pp. 157--158. It has been held that the custom of appointing a daughter is now obsolete. Vide L. R. 2. I. A. 163, 31 Mad. 310, 1 Patna L. J. 581.

2. It is to be noted that in the verse following these Yāj. lays down that each of the succeeding sons out of those enumerated took in the absence of the preceding one and that this rule applied only when all these were ascertained to be of the same class (varṇa) as their reputed father. *Putrikāputra* means either the son of the appointed daughter or the appointed daughter herself as a son. Vide notes to V. M, p. 159 as to *putrikā*. The kṣetraja was due to the practice of *niyoga*. Vide Gautama Dh. S. 18. 4-8 and Manu 9, 59—60 for *niyoga*. Modern Hindu law recognises only two kinds of sons out of the above, viz. *aurasa* and *dattaka* (except in Mithilā, where the *kṛtrima* also is recognised).

The same author (Vasiṣṭha Dh. S. 17.15) speaks of the last (second) variety 'the putrikā (appointed daughter) herself is the third son' (the other two being *aurasa* and *kṣetraja*). In this (latter) case the father's obsequies and the like are to be performed by the daughter herself. *Kṣetraja* is one who is begotten at the order (appointment) of the elders on the wife of a sonless brother and the like by a sagotra (one belonging to the same *gotra*, agnate) such as a husband's brother and the like. *Paunarbhava* is one who is begotten on *akṣatā* (i. e. a woman who had no sexual intercourse with the first husband) or on a *kṣatā* (i. e. a woman who had sexual intercourse with the first husband) by a second husband. The secondary sons other than the *dattaka* are prohibited in the Kali age, since among the matters prohibited in it (in Kaliyuga) we read 'the acceptance as sons of those that are other than the *dattaka* and the *aurasa*.'

Now (begins) the topic of the Dattaka (adopted son).

Now the procedure as to the *dattaka*. Manu (9. 168) says :[1]

He is to be known as the son given, whom the father or the mother affectionately gives (to another) as his son in (times of) distress confirming (the gift) with water, the boy being of the same (varṇa with the person adopting).

Madana says that from the use of the word *vā* (or) it follows that in the absence of the mother the father alone may give, in the absence of the father the mother alone (may give), but when both (parents) exist both should give. From the mention of *āpad* (distress) it follows that (a son) should not be

1. The whole of the section on adoption is briefly reviewed in 24 Bom. 367 at pp. 374--377. The theory of adoption involves 'the principle of a complete severance of the child adopted from the family in which he is born both in respect of the paternal and maternal line and his complete substitution into the adopter's family' per Mitter J. in 6 Cal. 256 (F. B.) which statement of the law was approved in L. R. 43 I. A. at p. 68, 25 Bom. L. R. at p. 817 and 49 Mad. 941 at p. 943. 'Whom the father &c. '—Vide *Shamsing* v. *Shantabai* 25 Bom. 557, where it was held that a Hindu who has a son can, after becoming a Mahomedan, give his son in adoption and can authorise his brother (the boy's uncle) to perform the actual giving. 'Mother'—In *Fakirappa* v. *Savitrewa* 23 Bom. L. R. 482 (F. B.) it was held following 24 Bom. 89 and overruling 33 Bom. 107 that a remarried Hindu widow cannot give in adoption a son by her first husband. 'Gives'—there must be actual giving and taking. Vide *Dhapabai* v. *Champalal* 1 Bom. L. R. 842 (where it was held that where the boy was absent and there was no actual giving and taking and only a deed was passed there was no

given away (in adoption) when there is no distress[1]. Vijñānes'vara holds that this prohibition (viz. a son should not be given when there is no distress) affects only the giver[2] (and not the receiver or the act of adoption) and is ***puruṣārtha*** (i. e. concerned only with the agent or his motives) and not ***kratvartha*** (i. e. not concerned with the religious act which has an unseen result). But this is not proper, since this prohibition (that a son should not be given in adoption when there is no distress) is understood to be ***kratvartha***[3], as it has an unseen result if we consider the syntactical connection (of it with the whole[4] act). Even if it be conceded that a seen result somehow follows (from this prohibition), it is necessary to postulate some unseen result for the positive restrictive injunction[5] (***niyama*** viz. a

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1. Some writers like Bālambhaṭṭa and Kātyāyana quoted in D. M. take the word *āpad* to mean ' distress of the natural father such as famine '; while others like Kullūkabhaṭṭa take *āpad* to mean simply ' distress due to the absence of a son on the part of a sonless man.' Vide notes to V. M. p. 161.

2. ' Affects only the giver '—Vide 24 Bom. 367 (F. B.) at p. 374 where this passage is quoted and explained.

3. The text of the Mayūkha here is extremely abstruse and it would add to the bulk of the notes to point out that Mandlik and other translators and expositors are wrong. Therefore that task has not been attempted. Only those who have made a deep study of the Mīmāṅsā can follow the discussion here. *Puruṣārtha* and *Kratvartha* are technical Mīmāṅsā terms and are dealt with in the 4th chapter of Jaimini's sūtras. Some things are prescribed in the Vedic and other texts for doing which the sole motive is the desirable result, while there are other actions which do not directly bring about what is desired by the agent but are performed for helping forward some other action or thing which brings about something desired by the agent. The former are *puruṣārtha*, the latter *kratvartha*. For example, *jyotiṣṭoma*, which is prescribed as bringing about heaven, and heaven itself are *puruṣārtha*, while the *prayājas* which form part of the procedure of the dars'apūrṇamāsa sacrifice are *kratvartha*. All substances useful in sacrifices and their purifications are *kratvartha*. If a thing that is *kratvartha* is not done or badly done, there is a defect in the *kratu* itself (the religious rite), but if a thing is simply *puruṣārtha* and it is not done or badly done there is no defect in the religious act itself, but the blame attaches to the agent alone. This reasoning was applied by the Mit. to the (implied) prohibition of not giving a son in the absence of distress, the result being that the act of adoption itself was valid, only the giver incurred blame. Vide notes to V M. pp. 161--162.

4. The adoption of a son is made for spiritual purposes (i. e. it has an unseen result just as heaven, the reward of performing jyotiṣṭoma, is an unseen result). Whatever is enjoined or prohibited in connection with this object is subsidiary (*aṅga*) to it and forms one connected whole with it. What is an *aṅga* to a religious act (*kratu*) is *kratvartha* (according to the Mīmāṅsā) and hence the prohibition is really *kratvartha*. *Vākya* is one of the six means of correctly interpreting Vedic texts.

5. A son could be given in adoption in distress as well as when there is no distress. Manu (9. 168) restricts the giving to a time of distress. This must have some spiritual or unseen result, as in the Vedic restriction of unhusking the grains of rice by mortar and pestle. *Niyama* is a technical Mīmāṅsā term. Vide notes to V. M. p. 163.

son should be given in adoption[1] in distrsss); and therefore if this restrictive rule be violated, then one cannot secure the unseen result which is the urging motive (***prayojaka***) of the particular act (viz. adoption here).* Some however hold that the word ***āpad*** (' distress ', in Manu's text) does not serve the purpose of implying a prohibition (of giving a son in adoption) when there is no distress, but that word only conveys this that distress (āpad) is an occasion (on which a son may be given in adoption), since the word ***āpad*** cannot be construed as meant to exclude (only) the giving of a son in the absence of distress (i. e. there is no ***parisaṁkhyā***), as such a construction would be liable to the faults of giving up the plain meaning and the like[2]. Nor can it be urged (as an objection), that if ***āpad*** were only to be understood as the occasion[3] (of giving in adoption), there would follow the undesirable conclusion that sin would be incurred by not giving a son (in adoption when another is) in distress; for this passage (of Manu).

1. So far Nīlakaṇṭha shows that the Mit. is not right in calling the implied prohibition (of giving when there is no distress) *puruṣārtha* and that if Mīmāṅsā is to be strictly followed it must be regarded as *kratvartha* so that action opposed to it would make the adoption itself invalid. Then he puts forward the view of some that there is neither *niyama* nor *parisaṁkhyā* in Manu's verse, but that verse is only permissive and puts forth the occasion when a son may be given. He does not refute this view and it looks probable that he approved of it.

2. For the terms *Niyama* and *Parisaṁkhyā* vide notes to V. M. pp. 163-166. *Vidhi* pure and simple lays down what is unknown from any other ordinary source of knowledge, such as the text ' one who desires heaven should perform jyotiṣṭoma '. A *Niyama* restricts the performance of a religious act to one out of two or more alternatives and prohibits the rest e. g. the text ' one should sacrifice on an even plot of land is a ' *niyama*, as it restricts performance to even ground and prohibits performance elsewhere. A *parisaṁkhyā* is a permissive rule, it allows the doing of a thing, though it does not really enjoin it and prohibits the doing of things other than those allowed; e. g. the text ' the flesh of the five five-nailed animals may be eaten' is a *parisaṁkhyā*, since it does not enjoin the eating of flesh, it only permits the flesh of five animals and impliedly prohibits the eating of the flesh of other animals. A *parisaṁkhyā* is always liable to three faults. It has to give up the plain sense (in the above the words read like an injunction that the flesh of five animals must be eaten i. e. there is *svārthatyāga*), we have to suppose that the text forbids the flesh of other animals (which is not expressed in so many words) and this implied prohibition is against what follows human cravings after flesh (i. e. there is *prāptabādha*). The view of some writers is that Manu's verse does not contain a *niyama* (as in that case it would be a sin not to give a son in distress), nor does it contain a *parisaṁkhyā*, which latter should not as far as possible be resorted to as it is liable to three faults. That verse is simply a definition of *dattaka* and nothing more.

3. Certain actions were prescribed as always obligatory and certain others were prescribed for certain occasions (*nimitta*). If both *nitya* and *naimittika* actions were not performed, sin was incurred. If Manu's verse put forword *āpad* as the occasion of giving in adoption, then by not giving a son in adoption in *āpad*, sin would be incurred. This objection is raised against the proposition of some that *āpad* is only a *nimitta* (occasion). It is answered in the words 'this passage' &c. i. e. the verse of Manu simply defines *dattaka* and contains no command (vidhi).

* P. 108 (text).

simply conveys the relation between an appellation (***samjñā***, here ***dattaka***) and the object denoted by it and it does not lay down (as a ***vidhi***, a positive rule or injunction) the giving (of a son in adoption) on the occasion of distress.

As to what the same writer (Vijñānes'vara) says on the subject of marriage, viz. ' in acting contrary to the prohibition against (marrying) a sickly girl and the like, one runs counter only to seen results, but the status of being a (legally married) wife does follow ', that ***dictum*** also is refuted by this very reasoning [1].

Sadṛs'am (in Manu 9. 168), according to Medhātithi[2], means ' equal in family and qualities ' and not by caste and hence even one of the ***kṣatriya*** class and the like may be a ***dattaka*** (adopted) son of a brāhmaṇa and the like. According to Kullūkabhaṭṭa [3] ***sadṛs'am*** means ' equal by caste '. And this (view of Kullūka) is proper, since Yājñavalkya, after beginning the enumeration of all the twelve sons in the words ' the ***aurasa*** is one born of the legally married wife' (II. 128), concludes with the words ' this rule has been promulgated by me as regards sons of the same caste (as the father's) [4]. This will be made clear by means of two texts of S'aunaka to be cited later on. Vijñānes'vara also (holds) the same (view).

He (Vijñānes'vara) also says that the prohibition that the eldest son must not be given[5] (in adoption) since the eldest son alone is the foremost

1. Yāj. (1. 53) lays down that one should marry a girl who is not diseased, who has a brother and whose *gotra* and *pravara* are different (from those of the bridegroom). The Mit. on this comments that even if one goes through the ceremony of marriage with a girl who is his *sapiṇḍa* or whose (father's) gotra and *pravara* are the same as the bridegroom's, there is no valid marriage and the girl does not become his *bhāryā* (a wife), but if one were to marry a sickly girl (in spite of the direction of Yāj.), a valid marriage takes place and the girl is his lawful wife, only he runs counter to visible results (i. e. marriage with a sickly girl may cause worry and unhappiness and the children of the marriage may also suffer). This means that according to the Mit. the prohibition against marrying a sickly girl is *puruṣārtha* and not *kratvartha*. Nīlakaṇṭha seems to hold that it is *kratvartha*.

2. Medhātithi composed a *bhāṣya* (commentary) on the Manusmṛti, which is the oldest extant one. He flourished about 900 A. D. Vide ' History of Dharmas'āstra ' pp. 268–275

3. Kullūkabhaṭṭa wrote a commentary on the Manusmṛti, which is the most widely known of all commentaries of Manu. He flourished about 1150--1250 A. D. Vide ' History of Dharmas'āstra ' pp. 359--368.

4. *Dattaka* is one of the twelve sons and so Yāj. is thinking only of a *sajātīya dattaka*. This is the reason why Nīl. says that Kullūka is right.

5. This passage of the Mayūkha up to the word ' sarvam ' below is referred to in 7 Bom. 221 at p. 224. *Vide also Tukaram* v. *Babaji* 1 Bom. L. R. 144 at p. 152 and *Vyas Chimanlal* v. *Vyasa Ramchandra* 24 Bom. 367 (F. B.) at p. 375. It has now been held that the prohibition as to the adoption of the eldest son is only admonitory, Vide 7 Bom. 221 and 2 Cal. 365.

(or the primary) agent in effecting the purpose to be served by the birth of a son as said in (Manu 9. 106) 'a man becomes ***putrin*** (one who has got a son) the moment the eldest son is born to him', affects only the giver (of the son) and not the acceptor (of the son)[1]. (Nīl. refutes the view of the Mit.). This prohibition might indeed have affected only the giver, if this (text, Manu 9. 106) did really prohibit the gift of the eldest son (in adoption). But it contains no such (prohibition), since there is no reason (to understand the text in that sense) and since the word ***putrībhavati***, conveying as it does that he becomes a ***putrin***, is simply meant to assert that the debt (that a man owes to his ancestors) is paid off (by the birth of the first-born son). On account of this (interpretation) the latter half (of Manu 9. 106) 'he (the father) becomes free from the debt of pitṛs (ancestors) and therefore he (the eldest son) is entitled to (receive) the whole (wealth) from him (the father)' is well construed (or connected with the first half). ***Sarvam*** (in Manu 9. 106) means 'the whole wealth'.

Only a male[2] can be a ***dattaka*** (adopted) and not a girl, because the pronoun *saḥ* (he), occurring in the passage 'he should be known as the son given' (Manu 9. 168) that conveys the relation between a term (***dattrima*** i. e. ***dattaka***) and the object denoted by it, can refer only to a male of the same caste (as that of the person adopting), who (male) is the object of the action of giving away on the occasion of distress, the gift being made by the parents and affection and water being the accompaniments (guṇa), just as the word (the pronoun) ***tam*** in 'one should perform the initiation (***upanayana***) ceremoney on a brāhmaṇa of eight years* and one should teach him (the Veda)' refers to one on whom the initiation (***upa-***

1. The view of the Mit. discussed above follows immediately after the words about not giving a son when there is no āpad. The words are 'anāpadi na deyaḥ, āturayaṁ pratiṣedhaḥ, tathā ekaḥ putro na deyaḥ...tathāneka-putra-sadbhāvepi jyeṣṭho na deyaḥ'. The Mit. does not expressly say that the prohibition against giving the eldest affects the giver only, but Nīl. from the context holds that the Mit. meant that. The Bālambhaṭṭī however explains the Mit. differently. A man was born under three debts, one of which due to his pitṛs (forefathers) he paid off by begetting a son (vide Tai. S. VI. 3. 10 5; Ait Br. VII. 13). Paying off the debt of the ancestors and saving the father from *put* hell (Manu. 9. 138) were the purposes served by a son.

2. In *Gangabai* v. *Anant* I. L. R. 13 Bom. 690 the adoption of a daughter by a brāhmaṇa was held invalid after referring to the opening paragraph on adoption up to 'both should give' (p. 104 above). Another vexed question has been the adoption of daughters by *naikins* (dancing girls). In *Mathura* v. *Esu* 4 Bom. 545 West J. held that the custom of adopting daughters cannot be recognised in the case of *naikins* by the courts of law and such adoption confers no right on the person adopted. This was followed in *Tara* v *Nana* 14 Bom. 90 and *Hira Naikin* v. *Radha* 37 Bom. 116. But the Madras High Court in *Venku* v. *Mahalinga* 11 Mad. 393 held that courts could recognise the custom of adoption of daughters by *naikins* and the court dissented from 4 Bom. 545. This was followed in 12 Mad. 214. But vide *Sanjivi* v. *Jalajakshi* 24. Mad. 229.

* P. 109 (text).

nayana) rite is performed, who is a brāhmaṇa of eight years and a male.[1] This reasoning refutes the *dictum* of some that the word *dattrima* ending in *map* (i. e. ma) according to the rule of (Pāṇini IV. 4. 20) " the affix *map* is invariably added in the sense of 'effected or brought about' to a formation ending in *tri*[2] " expresses also a girl given away to a bridegroom (in marriage) or to another (in adoption), since (in her case also) there is no distinction as to the fact of being brought about by gift.

S'aunaka speaks of the mode of accepting a son (in adoption):—

I, S'aunaka, will now expound the excellent (mode of) adoption. One having no son (male issue)[3] or one whose son (male issue) is dead, having observed a fast for the sake of (adopting) a son, having made gifts of a pair of wearing garments, a pair of ear-rings, a turban and a ring to an ācārya (priest), who is a thorough master of the Vedas, a devotee of Viṣṇu and who is religiously disposed, and having brought a bundle of kus'a grass and fuel-sticks of the *palās'a* (Butea Frondosa) tree, having summoned his relatives and kinsmen and having feasted them and specially brāhmaṇas, having performed the whole of the details (*tantra*) of the rites commencing with *anvādhāna* (placing of fuel-sticks on the consecrated fire) and such other rites as purification of the clarified butter (by passing two blades of kus'a grass through it) and having gone before the giver (natural father of the boy), he should cause a request

1. For supporting his proposition that only a male can be adopted, Nīlakaṇṭha cites a parallel based on a Vedic text. *Upanayana* (initiation for Vedic study) is performed only in the case of males, so adoption also should be confined to males. Vide Apastambagṛhya IV. 10. 2 and Sudars'anācārya's commentary thereon for the Vedic text 'aṣṭavarṣam' &c. The general rule is that the number and gender of a word are not to be insisted upon as in the well-known example 'he cleanses the cup', where though the singular is used all cups are to be cleansed. But in certain cases the gender of a word is to be insisted upon as laid down by Jaimini in IV. I. 17. The word *guṇa* (subsidiary matter) is used in a technical sense. Vide notes to V. M. pp. 168--169.

2. *Tri* is affixed according to Pāṇini (III. 3. 88) and has *ma* then added on. The word *dattrima* according to Pāṇini means 'brought about by gift', which may apply to a male as well as female. Just as a son is *dattrima* because his status (as adopted son) is brought about by the action of giving, so a girl adopted by another or married by another may also be called dattrimā. since her status as bride or as adopted daughter is equally brought about by the act of giving. This is the reasoning of some. Nīl. says that this is refuted by the parallel example of *upanayana*.

3. The word putra stands for son, grandson and great-grandson. In *Hanmant* v. *Bhimacharya* I. L. R. 12 Bom. 105 it was held that an adoption by a childless Hindu is valid even though his wife be pregnant at the time of adoption and even if she later gives birth to a son. In *Gopal* v. *Narayan* 12 Bom. 329 it was held that an unmarried man may adopt. In *Bharmappa* v. *Ujjangauda* 46 Bom. 455 (=23 Bom. L. R. 1320), after referring at p. 459 to the texts of Atri, Manu and S'aunaka and to Mandlik's translation of *aputra* (at p. 460) it was held that a man having a grandson disqualified from inheritance owing to congenital and incurable dumbness cannot adopt a son and that there is nothing in the Vyavahārmayūkha to lend support to the view that he can adopt. Vide *Nagammal* v. *Sankarappa* 54 Mad. 576, 585 which dissents from 46 Bom. 455.

to be made to him 'give me your son.' The giver being capable of making a gift (should give his son) with (after reciting) the five (ṛk verses) 'ye yajñena' (Ṛgveda X. 62. 1--5) and (the adopter) having taken (the boy) with both his hands after repeating the *mantra* 'devasya tvā' (Vāj. S. 20. 3, Kāṭhaka S. I. 2,4 &c.), having inaudibly repeated the verse (*ṛk*) '*aṅgād-aṅgāt &c.' [1] and smelt the top of the boy's head; having decked with clothes and the like the boy who bears the appearance (or resemblance) of a son (of the receiver's body), having brought him in the middle of the house to the accompaniment of dancing, singing, instrumental music and benedictory words; having cast into fire according to the s'āstra offerings of boiled rice with the *ṛk* 'yastvā hṛdā (Ṛg. V. 4. 10), with the ṛk 'tubhyam agre' (Ṛg. X. 85. 38) and (offered) five oblations of rice with each of the *ṛks* beginning with 'somo dadat' (Ṛg. X. 85. 41) and having performed the *homa* to (Agni) *sviṣṭakṛt*, [2] he (the adoptive father) should finish the rest (of the rites). Among Brāhmaṇas the adoption

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1. The first half of it occurs in S'atapatha Br. 14. 9. 4. 8; the whole occurs in the Mānavagṛhya I. 18. 6, which adds that the father after returning from a journey and having smelt the top of the son's head, should mutter it. It occurs in the Nirukta (III. 4) also. Vide *Bhagwan Singh* v. *Bhagwan Singh* 17 All. 294 at p. 386 where Edge C. J. prefers Bühler's translation 'he should then adorn the child which (now) resembles a son of the receiver's body' to Mandlik's translation (p. 52) 'having with clothes and the like adorned the boy bearing the reflection of a son'. Vide p. 376 where Mandlik's translation of S'aunaka's text quoted in the Vyavahāramayūkha is cited.

2. *Homa* to *Sviṣṭakṛt* is the one offered to *fire* (Agni) called Sviṣṭakṛt at the termination of a sacrificial act. It has been held that the *dattahoma* is not absolutely necessary for the validity of an adoption even among brāhmaṇas if the adopted boy belongs to the same *gotra* as the adoptive father. Vide *Bal Gangadhar Tilak* v. *Shriniwas* L. R. 42 I. A. p. 135 at p. 150 (= 39 Bom. 441), *Govindayyar* v. *Dorasami* 11 Mad. 5 (F. B.), *Sheolotan* v. *Bhirgun* 2 Patna L. J. 481, *Govindaprasad* v. *Rindabai* 49 Bom. 515 (= 27 Bom. L. R. 365). In this last case the adoption of a boy of a different gotra by a Kanoj Brāhmaṇa's widow without *dattahoma* was held invalid. Where the actual giving and taking took place during the lifetime of the adoptive father, the *dattahoma* where necessary may be performed after his death by his widow or another person (vide *Venkata* v. *Subhadra* 7 Mad. 548, *Mandavilli Seetaramamma* v. *Antavilli Suryanarayana* 49 Mad. 969). In *Sri Sri Chandramala* v. *Sri Muktamala* 6 Mad. 20 it was held that among Kṣatriyas in the Madras Presidency an adoption without *dattahoma* was valid; but in *Ranganayakamma* v. *Alwar Setti* 13 Mad. 214 at p. 219 it was held that *dattahoma* would be necessary for the validity of an adoption among *Komaṭis* (or vais'yas). In *Mahashoya Shoshinath* v. *Shrimati Krishna Soondari* L. R. 7 I. A. p. 250 the Privy Council observed (p. 255--56). 'The mode of giving and taking a child in adoption continues to stand on Hindu law and Hindu usage and it is perfectly clear that among the twice-born classes there could be no such adoption by deed, because certain religious ceremonies, the *dattahomam* in particular, are in their case requisite. This was an *obiter dictum* since the point there was whether among s'ūdras there could be a valid adoption by mere deed without actual giving and taking. Still being the dictum of the highest tribunal for India it is entitled to great respect.

* P. 110 (text)

of a son should be made from amongst the *sapiṇḍas*[1] or in the absence of them (*sapiṇḍas*), one who is not a *sapiṇḍa* (may be adopted), but (one) should not adopt (a son) from elsewhere (i. e. from another caste). Among kṣatriyas, (one) from their own caste or one whose *gotra* is the same as that of the (adopter's) preceptor[2] (should be adopted), among *vais'yas* (one) from amongst those born in the Vais'ya caste and among *s'ūdras* (one) from among the *s'ūdra* castes (should be adopted)[3]. In the case of all the *varṇas* (the four castes) from their respective castes only (are adoptions to be made) and not from a different (caste). And a daughter's son and a sister's son are given in adoption to a s'ūdra also. One having an only son [4*] should never give in adoption his son. By one having several sons the giving in adoption may assiduously be resorted to. A brāhmāṇa (should adopt) after bestowing on his priest a *dakṣiṇā* (gift or fee) according to his ability, a king (after bestowing) even as much as half (of the yearly revenue) of his kingdom,[5] a vais'ya three hundred coins, a

1. The Mit. on Yāj. I. 52 defines the meaning of sapiṇḍa in connection with the topic of marriage and on Yāj, I. 53 sets out the limits of Sapiṇḍa relationship. The Mit· lays down the general proposition that wherever the word sapiṇḍa occurs, connection through particles of the same body directly or mediately has to be understood. *Sapiṇḍa* relationship plays the most prominent part in three topics, viz. marriage, inheritance and succession and *āśauca* (impurity on birth and death). For a translation of the Mit. passage on *sapiṇḍa* vide *Lallubhai* v. *Mankuvarbai* 2 Bom. 388 at p. 423, *Lallubhai* v. *Cossibai* 7 I. A. 212 at p. 232 = 5 Bom. 110, 119 and *Kesserbai* v. *Hunsraj* 30 Bom. 431 (P. C.) at p. 443· The passage from ' Among brāhmaṇas &c ' to ' ....sister's son are given in adoption to a s'ūdra also ' is quoted in 17 All. 294 (F. B.) at p. 376 and in 9 Mad. 44 at p. 51 (where it is said that the Dattaka-mīmāṁsā and Dattakacandrikā add one half verse viz· brāhmaṇādi-traye nāsti bhāgineyaḥ sutaḥ kvacit'.

2. According to the Ās'valāyanas'rautasūtra I. 3 and the Mit. (on Yāj. I. 53) kṣatriyas were supposed not to have special *gotras* of their own and it is laid down that their relations are regulated by the *gotras* of their *purohita* (family priest). It is however noteworthy that Ās'valayāna (S'r. S. VI. 15) himself gives Mānava, Aila and Paurūravasa as the *pravaras* of kṣatriyas. For the meaning of *gotra* vide Āpastamba Dh. S. II. 5. 11· 15 in S. B. E. Vol. II. p. 126 *n.* and *Kalgavda* v. *Somappa* 33 Bom. 669, 682--683.

3. In *Tukaram* v. *Babaji* 1 Bom. L. R. 144 an adoption by a woman who was a Tilari (inferior Lingayat) of a boy who was a *Kulvadi* or *Mahratta* was held to be valid.

4. At one time courts held that the adoption of an only son was entirely null and void, *vide Lakshmappa* v. *Ramava* 12 Bom. H. C. R. 362, 376, *Waman* v. *Krishnaji* 14 Bom. 249 (F. B.), *Basawa* v. *Lingangavda* 19 Bom. 428 (where all texts and authorities are elaborately discussed); but now all High Courts hold that such an adoption is valid. Vide *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* L. R. 26 I. A. 113 (=22 Mad. 398), *Radha Mohun* v. *Hardai Bibi* 21 All. 460 (P. C.), *Vyas Chimanlal* v. *Vyas Ramachandra* 24 Bom. 367 F. B. at p. 375 (= 2 Bom. L. R. 163.)

5. The D. M. explains ' half kingdom ' to mean half of the yearly revenue of the kingdom and ' *sarsvasva* ' (all wealth) to mean the whole of a year's income . This seems reasonable.

*P. 111 (text).

s'ūdra even the whole (of his yearly) wealth ; if he be unable (to pay so much) according to his ability.

Chāyāvahaham (bearing the appearance or reflection) means ' similar to '. *Dauhitro bhāgineyas'a* (a daughter's son and a sister's son). Just[1] as in the passage ' he (the sacrificer or the *adhvaryu*

1. This is among the most difficult passages of the Vyavahāramayūkha, containing as it does a highly technical discussion of Pūrva Mīmāṁsā doctrines. For detailed explanation of various terms, vide notes to V.M. pp. 173--177. The Maitrāvaruṇa is an assistant of the hotṛ priest in sacrifice, whose business it is to loudly repeat the *praiṣas* (directory formula) such as 'hotā yakaṣt' &c. A staff is given to a sacrificer when he is initiated for a sacrifice. This effects a *saṁskāra* (purification) of the sacrificer. The staff is a thing that already exists (*bhūta*); but it serves a future purpose also (i. e. it is a *bhāvyupyogi*). The staff is given to the *Maitrāvaruṇa* by the *adhvaryu* (or the sacrificer, according to some) for holding firmly as said in the sentence ' he gives a staff to the maitrāvaruṇa '. What is of use in future or what is to be accomplished is called *bhāvya*. In the sentence ' one desirous of heaven should offer a sacrifice ' the real meaning is 'by sacrifice heaven should be accomplished' i. e. *heaven* is the object or goal (*bhāvya*) to be accomplished and is put in the accusative case (*yāgena svargaṁ* bhāvayet). So it may plausibly be argued that, though the staff is already existing (bhūta), it is of use to the Maitrāvaruṇa and is put in the accusative case and so it is the *bhāvya* (the object to be accomplished, the principal thing). But this is not correct. Vide Jaiminī IV. 2. 16--17 for a discussion. There is another sentence ' the Maitrāvaruṇa holding the staff repeats the *praiṣas* ' i. e. the staff serves him as a support when loudly repeating *praiṣas*. The dative case (in *maitrāvaruṇāya daṇḍam* &c.) shows that the intention is to regard the Maitrāvaruṇa as the principal (pradhāna) factor in this sentence and not the staff. The giving of the staff effects a saṁskāra in Maitravāruṇa and therefore that is the *vidheya* (the matter enjoined) in this sentence. This reasoning is extended to the words of S'aunaka that a daughter's son and a sister's son are given to a s'ūdra. Here also there is giving (*dāna*) as in the sentence ' he gives the staff ' &c. and the word s'ūdra is put in the genitive case which has the sense of dative. Therefore s'ūdra is like Maitrāvaruṇa the principal factor (pradhāna) in this sentence and the bhāvya. The gift of the daughter's son and sister's son is the *vidheya* (what is enjoined) with reference to s'ūdra, the idea being ' dauhitrabhāgineyadānena s'ūdram bhāvayet '. The Vedas lay down for all (including s'ūdras) the duty of paying off the debt due to the ancestors by means of sons. So it follows as a matter of course that a sonless s'ūdra should adopt a son. Therefore the words ' a daughter's son &c .' are not to be construed as prescribing adoption for s'ūdras (as that is already known), but they lay down a restrictive injunction (a *niyama* vidhi) for a s'ūdra that he is to adpot a daughter's or sister's son if available. S'ūdra being the principal (*śeṣin*) is the bhāvya and the *dauhitra* and *bhāgineya* are the *śeṣa* since they serve the purpose of the s'ūdra by enabling him to pay off a debt. For s'esa and s'eṣin vide Jaimini III. 1. 2-6. The vidheya (thing enjoined) is the gift of the two. It is a restrictive rule and its province is *dauhitra* and *bhāgineya* and not *śūdra*. It is possible for a s'ūdra to adopt any one whether *dauhitra* and bhāgineya or not. But if this sentence is taken as a *niyamavidhi* he must first choose the dauhitra or bhāgineya, that is the text means ' dauhitrabhāgineyau eva s'ūdrasya '. If this were not accepted, then the text of S'aunaka would have to be construed as dauhitra-bhāgineyau s'ūdrasya eva ' (daughter's son and sister's son are to be adopted by the s'ūdra alone). This would make the sentence a *parisaṁkhyā* (allowing the adoption of the two to *śūdras* but forbidding it in the case of members of the regenerate classes), which is to be resorted to only if no other construction is possible, as it is liable to three faults (explained above p. 106*n*. 2). It is always better to construe a passage as a *niyama* than as a *parisaṁkhyā*. Hence

priest) hands over a staff to the ***maitrāvaruṇa*** ', although it is possible to regard the staff as the bhāvya (the principal factor or goal) since it is an already existing thing and is of use in the future, yet the maitrāvaruṇa himself, who serves a purpose in future as the agent of the act of repeating the ***praiṣas*** as said in the passage '(the mitrāvaruṇa) holding the staff repeats the ***praiṣas*** ', is expressed to be the ***bhāvya*** by the dative form (viz. ***maitrāvaruṇāya*** in the passage first quoted), similarly here also (in the text of S'aunaka ' the daughter's son &c. ') the s'ūdra himself, who has not paid off the debt (to his ancestors), is the ***bhāvya*** on account of the possessive case (i. e. s'ūdrasya) that is used in the sense of the dative, he being the ***s'eṣin*** (the principal whose purpose is to be served by another) with reference to the daughter's son and the sister's son (that are ***s'eṣa***, i. e. serve his purpose). Hence those two themselves (daughter's and sister's son) being the ***vidheya*** (what is enjoined), it follows also that (in the passage of S'aunaka) they two alone are the province or subject matter of the restrictive rule (***niyamavidhi***) in the form ' daughter's son and sister's son alone (are to be adopted) by s'ūdra ', while the s'ūdra not

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Nil. construes the text as a restrictive rule (*niyama.*). How difficult this passage is may be understood from the suggestion of Mr. Gharpure to take 'vidheyatvena' as equal to 'vidheyatvābhāvena ' (tr. p. 72 n. 7). It is rather strange that in *Vyas Chimanlal* v. *Vyas Ramchandra* 24 Bom 473 at p. 480 it is said that the V. M. is opposed to the adoption by the regenerate classes of the daughter's son and sister's son and in *Gopal Narhar* v. *Hanmanta Ganesh* I. L. R. 3 Bom. 273 at p. 280 there is an elaborate discussion on this point, the conclusion reached being ' we see no reason for supposing that he intended to relax the interdiction of such adoptions by brāhmaṇas. kṣatriyas and vais'yas.' It is submitted with great respect that this is wrong. The V. M. approves of what is said in the *Dvaitanirṇaya* by S'aṅkarabhaṭṭa and in the Dvaitanirṇaya it is expressly said (vide notes to V. M. p. 180) that brāhmaṇas and others can adopt the daughter's or sister's son. In 17 All. 294 (F. B.) it was held that the Benares school does not prohibit the adoption by the three regenerate classes of the daughter's or sister's son, or mother's sister's son but this was over-ruled in *Bhagwan Singh* v. *Bhagwan Singh* 26 I. A. 153 (=21 All. 412), where the adoption of a mother's sister's son by a kṣatriya was held to be absolutely void. According to all High Courts in India, it may be taken as settled that the adoption of these three (daughter's son &c.) by the three regenerate classes is forbidden. Vide *Mussummat Sundar* v. *Mussummat Parbati* 16 I. A. 186 (Allahabad case), *Gopalayyan* v. *Raghupatiayyan* 7 Mad. H. C. R. 250, *Bhau* v. *Hari* 25 Bom. L. R. 411, *Walbai* v. *Heerbai* 34 Bom. 491 (mother's sister's son). But there are several decisions holding that the adoption of a daughter's son or a sister's son may be valid by custom even among brāhmaṇas. Vide 14 All. 53 (adoption of sister's son by Bohra Brahmins of North West Provinces), *Gowri* v. *Shivram* P. J. 1894 p. 80 (adoption of daughter's son among Havik brāhmaṇas of Canara), *Manjunath* v. *Kaveribai* 4 Bom. L. R. 140 (adoption of a sister's son among Sarasvat Brāhmaṇas of Canara), *Vayidinada* v. *Appu* 9 Mad. 44 F. B. (adoption of daughter's or sister's, son by brāhmaṇas of South India upheld), *Viswasundar* v. *Somasundara* 43 Mad. 876 (adoption of a daughter's son among brāhmaṇas of the *Andhra* or *Telugu* country), *Sundrabai* v. *Hanmant* 34 Bom. L. R. 802 (= 56 Bom. 298) where the adoption of a daughter's son by a *Deśastha* Smārta brāhmaṇa of Dharwar was upheld on the ground of custom.

being the *vidheya* (what is enjoined), in that passage cannot possibly be the province of a *niyama*. If the text (of S'aunaka ' daughter's son &c ') were explained as ' the two (may be adopted by s'ūdra only, ' the (undesirable) consequence would be that there would be a *parisaṅkhyā* (implied exclusion inferred from a permissive rule) in the case of brāhmaṇas and others who also (like the s'ūdra) are *s'eṣin* (with reference to the act of adoption that serves the purpose of all and is therefore *s'eṣa*).

Therefore the daughter's son and the sister's son alone are the principal (adoptees) for a s'ūdra. Failing them, any one else of the same caste (may also be adopted), since the same author himself (S'aunaka) says ' among s'ūdras (one) from among the s'ūdra castes '. Nor (can it be urged that)[1] this word *jāti* (caste) should be so narrowed down as to be limited to only the daughter's son and sister's son (of a s'ūdra), since the status of being a daughter's or a sister's son and that of belonging to the same caste are not co-existent and since the (undesirable) conclusion would follow that in the same smṛti (passage) a general rule will have to be regarded as redundant.

And this matter has been expounded in the Dviatanirṇaya[2] by my revered father . To the same effect is the usage of the *s'iṣṭas* (cultured or respectable people).

Thus the right of * the s'ūdra (to adopt) being established like that

1. Nor can it be urged &c. — In this Nīl. anticipates an objection and meets it. S'aunaka gives a general rule (*sāmānya vākya*) that among s'ūdras adoption should be from among s'ūdra castes; he also gives the particular rule that a *dauhitra* and *bhāgineya* are for s'ūdra (which has been construed above as a restrictive rule). These two must be so construed as not to conflict. That can be done by saying that a s'ūdra can only adopt a *dauhitra* or *bhāgineya* who is of the same caste with him and that he cannot adopt anyone else even of his own caste. Nīl. does not accept this and gives two reasons. An *upasaṁhāra* (narrowing down of one sentence to another) is possible only when the two sentences stand in the relation of general proposition and particular proposition. Vide Jaimini III. 1. 26--27. But the above two sentences do not stand in that relation. When inter-marriages were allowed a s'ūdra's daughter or sister could have married a person of a higher caste and his *dauhitra* or *bhāgineya* would not have been a s'ūdra but of a mixed caste. Nil. gives another reason also for rejecting the narrowing down. If a s'ūdra cannot adopt anyone of his own caste except *dauhitra* and *bhāgineya*, the general rule of S'aunaka (viz. among s'ūdras one from the s'ūdra castes) becomes useless. Therefore to give free scope to both rules one should construe that for a s'ūdra the principal adoptees are *dauhitra* and *bhāgineya* and failing them any s'ūdra. Vide notes to V. M. pp. 178--179. This passage has nothing to do with the fault called vākyabheda as Mr. Gharpure supposes (p. 74*n*, 1).

2. The Dvaitanirṇaya is a work of S'aṅkarabhaṭṭa, the father of Nīl. which contains discussions in accordance with Mīmāṁsā principles on various knotty points of *dharmaśāstra*. For a full account vide my paper on the work in the Annals of the Bhandarkar Institute, vol. III. part 2, pp. 67--72.

* P. 112 (text).

of the Nişāda[1] who is a chief (to perform Raudra sacrifice), the ***dictum*** of the S'uddhiviveka, that the s'ūdra is not entitled to make the adoption of a son, which is accompanied with ***homa***[2] that is to be performed with the Vedic ***mantras***, is refuted. The ***homa*** with vedic ***mantras*** should, however, be performed by him (by the s'ūdra who adopts a son) through a brāhmaṇa, since Parās'ara (6. 63--64) says :

He for whom a fast, a ***vrata*** (certain penance or act vowed to be done), a homa, ablution at a holy place, muttering of prayers and the like are performed by brāhmaṇas, secures the fruit (the merit) thereof.

Smārta[3] and Harinātha also say the same thing. As to what Parās'ara himself says (12. 39):

That brāhmaṇa, who for the sake of dakṣiṇā (gift of money or fee) offers oblation into fire on behalf of a s'ūdra, would become a s'ūdra, while the s'ūdra (for whom he offers) would become a brāhmaṇa

that, according to Mādhava,[4] propounds that the merit of the rite goes to the s'ūdra and the brāhmaṇa incurs sin.

Even a woman is entitled like the s'ūdra to adopt, since there is a text ' women and sūdras have the same rules of conduct ' (prescribed for them).[5] Vasiṣṭha[6] (Dh. S. 15. 1--9) says " man produced from seed and blood

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1. *The Nişādasthapati-nyāya is a well-known one. Vide notes to V. M. p. 181.* A Nişāda was the offspring of a brāhmaṇa from a s'ūdra woman (Manu X. 8) and so belonged to a mixed caste. In speaking of the Raudra iṣṭi (sacrifice), the Veda says that a Nişāda-sthapati should be made to perform that sacrifice. Jaimini (VI. I. 25--38) establishes that only members of the regenerate classes are authorised to perform vedic sacrifices. Therefore a question arises whether *niṣādasthapati* (who is to perform Raudra sacrifice) means the chief (*sthapati*) belonging to one of the three higher castes who rules over niṣādas or one who is a chief and also a niṣāda. The conclusion is that on account of the express words of the Veda, it is the chief of the niṣāda caste who is meant, though he is not authorised to perform Vedic rites in general. Vide Jaimini VI. 1. 51. A s'ūdra also on account of the express words of S'aunaka is entitled to adopt. The S'uddhiviveka is a work of Rudradhara, who flourished between 1425--1460 A. D. Vide ' History of Dharmas'āstra ' pp. 395--397.

2. In *Indramoni* v. *Beharilal* L. R. 7 I. A. 24 (adoption among s'ūdras of Bengal) it was said that *dattahoma* was not necessary among s'ūdras and that the latter may be performed through the intervention of a brāhmaṇa. Vide also *Ravji* v. *Lakshmibai* 11 Bom. 381 at p. 393.

3. Smārta is an a appellation of the great Bengal writer Raghunandana. The work referred to is his Sambandhatattva. Harinātha is the author of a large digest on dharmas'āstra called Smṛtisāra. The text of Parās'ara and the Mayūkha thereon are quoted in *Atmaram* v. *Madhorao* 6 All. 276 (F. B.) at p. 281.

4. Mādhava is the famous minister of the great Vijayanagara emperors Bukka and Harihara, who wrote numerous works. The work here referred to is his commentary on Parās'ara (Vol. II. part 2 p. 20).

5. ' Women and s'ūdras &c. ' — Vide Manu IX. 18 and Baud. Dh. S. IV. 5. 4. This rule applies only where a woman performed a religious act independently by herself. She was, however, authorised along with her husband to take part in vedic rites. Vide Jaimini VI. 1. 17.

6. The whole of this passage from Vasiṣṭha (except the last sūtra) is translated in *Ganga Sahai* v. *Lekhraj* 9 All. 253 at p. 300. The passage from ' man '...... to ' permission ' is quoted in *Tulsi Ram* v. *Behari Lal* 12 All. 328 at p. 338 and 30 Cal. 965 at p. 972.

owes his birth to his mother and father. (Hence) the mother and the father have power to give, to sell or to abandon him. But one should not give or accept an only son[1]; for he saves a man (from *put* hell). A woman should neither give nor receive a son (in adoption) unless with the permisson of her husband.[2] One about to take a son in adoption should, after having invited his kinsmen, having informed the ruler[3] (of the intended adoption) and having performed a *homa* in the middle of his house with the *vyāhṛtis*, take (in adoption) only him who is closely related and who is a kinsman not remote (in habitation and speech).* If a doubt arises (as to the family and qualities of the person to be adopted), he (the person desirous of adopting) should treat one whose kinsmen are in a remote place as if he were a *s'ūdra*; for it is declared (in the Brāhmaṇa works) that ' by means of one (son, aurasa or adopted) he (the adopter) saves many .' If, after a son is taken (in adoption), an *aurasa* son is born (to the adopter), he (the adopted son) shall be the recipient of a fourth share[4]. "

1. ' One......only son '—In the printed Vasiṣṭha Dh. S. we read ' for he is (required) to continue the line of his ancestor's in place of ' for, he saves &c. '. This text was very much discussed in several cases in connection with Jaimini's rule that certain texts containing the statement of a reason are merely recommendatory. Vide *Beni Prasad* v. *Hardai Bibi* 14 All. 57 (F. B.) at pp. 72--73 and *Radha Mohan* v. *Hardai bibi* 21 All. 460 (P. C.) at p. 480 for discussion of Jaimini. Jaimini's rule is contained in what is called the *hetuvan--nigadādhikaraṇa* (I. 2. 26--30). Vide also 22 Mad. 398 (P. C.) at p. 425.

2. This text of Vas. has given rise to varying interpretations. According to the Dattaka-mīmāṁsā, a widow cannot adopt at all as her husband's permission cannot be had at the time of adoption. Others hold that the widow can adopt, if the husband gave her authority to adopt. The Madras decisions hold that the words ' consent of the husband ' are only illustrative and a widow can adopt also with the consent of the sapiṇḍas of the husband. The Mayūkha holds that a widow can adopt a son or give her son away even in the absence of the husband's consent provided he has not prohibited her from doing so. Vide for this passage *Vithoba* v. *Bapu* 15 Bom. 110 at p. 131 (where Mandlik's translation ' her father' is regarded as correct and relied upon) and *Rangubai* v. *Bhagirthibai* I. L. R. 2 Bom. 377 at p. 380, the *Collector of Madura* v. *Mootoo* 12 Moo. I. A. 397 at pp. 435--436 and *Rajah Venkatappa* v. *Ranga Rao* 39 Mad. 772 at p. 775.

3. Vide *Narhar Govind* v. *Narayan* I. L. R. 1 Bom. 607 where it was held that the sanction of Government to an adoption by a Kulkarni or his widow is not necessary to give validity nor has Government any right to prohibit or otherwise intervene in such an adoption. Vide also *Balaji* v. *Datto* 4 Bom. L. R. 762 (= 27 Bom. 75).

4. This has been interpreted in Bombay as meaning that he takes $\frac{1}{4}$ of what the *aurasa* takes and not of the whole estate i. e. the adopted son takes $\frac{1}{5}$ and the subsequently born *aurasa* son $\frac{4}{5}$. Vide *Giriapa* v. *Ningapa* 17 Bom. 100 at p. 101 where this text is quoted and also the remarks of the V. M. a little later on about the *Dvyāmuṣyāyaṇa* (at p. 116 text). Vide also *Dhondo* v. *Appaji* P. J. 1893 p. 6, *Tukaram Mahadu* v. *Ramchandra* 49 Bom. 672 = 27 Bom. L.R. 921 (where it is held that there is no distinction in respect of the share even among s'ūdras). In *Bala Krishnayya* v. *Venkata Triambakam* 43 Mad. 398 it was held in a suit for partition brought by the father and the *aurasa* son against the previously adopted son that the adopted son would get $\frac{1}{9}$, the father and *aurasa* son $\frac{4}{9}$ths each. But in *Perrazu* v. *Subbarayadu* 48 I. A. 280 (= 44 Mad. 656) the Privy Council held that among s'ūdras in Madras and Bengal an adopted son shares equally with an after-born *aurasa* son, as the Dattaka--candrikā says. Vide *Asita Mohon* v. *Niroda Mohon* 20 C. W. N. 901.

* P. 118 (text).

The permission of the husband, however, is (required) only for a woman whose husband is alive, since it (permission) serves an evident (or visible) purpose; but in the case of a widow, it (adoption) takes place even without it (i. e. without husband's permission) with the assent of the father[1] and failing him with that of the *jñāti* (kinsmen). Hence it is that Yājñavalkya (I. 85) lays down woman's dependence on her husband with reference to a particular state alone (viz. during marriage and his life):

> The father should guard the unmarried daughter, the husband when she is married, (her) sons in her old age; failing them (sons), their kinsmen (should guard a woman). A woman has no independence at any time.

In the absence of him (the husband) or when, owing to old age and the like, he is unable (to protect her) there is dependence (for her) also on the sons and the rest. By Kātyāyana also the assent of the father, husband and the like has been stated with reference to particular states (of a woman):

> Whatever acts for the benefit (of her soul) after her death a woman does without being permitted by the father, the husband or the son brings no fruit to her.

Aurdhvadehikam (in Kātyāyana's text) means 'having reference to the other world'. Therefore that permission of the husband which follows (as a matter of course as a requisite) in a certain condition (viz. when he is living) is merely re-iterated in this (passage of Vasiṣṭha) and is not enjoined as a new and positive injunction [2]. Hence a widow has authority (to adopt)

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1. The translation of Mandlik 'her father', which Mr. Gharpure follows (p. 79), is not correct. The word 'father' here must be taken to mean from the context 'the father of the husband' (i. e. the widow's father-in-law) and not her own father. The father of the widow has nothing to do with the family and property of her husband. The woman by marriage passes into the husband's *gotra* and his jñātis become her jñātis also. So jñātis here mean her husband's kinsmen. Jñāti generally means agnatic relations; vide Manu 3. 264, 9. 239 and *Vishwasundara* v. *Somasundara* 43 Mad. 876 at pp. 884--885 where the meaning of sapiṇḍa and jñāti in the matter of taking consent is discussed and it is held that the latter word means agnates and that to an adoption by a widow her daughter's son's consent was unnecessary. In *Kesar Singh* v. *The Secretary* of *State for India* 49 Mad. 652 (where the decision in 43 Mad. 876 was not approved of) it was held that if no agnates were left the consent of a bandhu might suffice. In *Vithoba* v. *Bapu* 15 Bom. 110 (where the adoption by a predeceased son's widow with the permission of her father-in-law was upheld though there was no consent of her brother-in-law) Candy J. appears to quote (at p. 131) Mandlik's translation 'the husband's permission............no independence at any time' with approval (including the words 'her father') but the decision shows that the father in that case was the father of her husband (and not *her* father).

2. The words of Vasiṣṭha 'a woman should not give.........without the permission of her husband' do not, according to Nīl. prescribe a rule unknown from other sources (i. e. they do not contain an *apūrvavidhi*), but they simply re-iterate (i. e. they are a mere *anuvāda*) what is well-known.

even without the permission of her husband[1].

Adurebāndhavam (in Vasiṣṭha's passage above) means ' a near sapiṇḍa as far as possible '. And even among nearer (sapiṇḍas), the brother's son is the principal (adoptee), since Manu (9. 182) says :—

If among brothers sprung from the same (father) one has a son, Manu has declared that on account of that son all become ***putrins*** (persons having a son).

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1. The decisions of the Indian courts and of the Privy Council on the widow's power of adoption are numerous, but as they have no direct bearing on the text of the Mayūkha they are passed over. It is important to note, however, a few Bombay decisions. In *Ramji* v. *Ghamau* 6 Bom. 498 (F. B.) it was held that a Hindu widow who has not the family estate vested in her and whose husband was not separated at the time of his death is not competent to adopt a son to her husband without his authority or the consent of his undivided coparceners. In *Yadao* v. *Namdeo* 48 I. A. 513 certain dicta of their Lordships (at pp. 524–526) of the Privy Council seemed to cast doubts on this Full Bench decision, but it was held that the Privy Council decision had not overruled the Full Bench decision in 6 Bom. 498 and that a widow in a joint family cannot adopt without the consent of surviving coparceners (vide *Ishwar Dadu* v. *Gajabai* 50 Bom. 468 F. B. = 28 Bom. L. R. 782). But in *Bhimabai* v. *Gurunathgauda* 35 Bom. L. R. 200 (P. C.) the Privy Council has very recently overruled the decisions in *Ramji* v. *Ghamau* and *Ishwar Dadu* v. *Gajabai* and has held that the widow of a coparcener in a joint Hindu family in the Mahratta country of the Bombay Presidency has power to make a valid adoption without either the express authority of her husband or the consent of surviving coparceners. The Privy Council relies on their earlier decision in *Yadao* v. *Namdeo* and refer to Mayūkha viz. the words 'the permission of the husband......Hence a widow has authority to adopt &c.)' Ranade J. in *Payapa* v. *Appanna* I. L. R. 23 Bom. 327 stated the settled rule as ' It is only the widow of the last full owner who has the right to take a son in adoption to such owner and that a person in whom the estate does not vest cannot make a valid adoption, so as to divest (without their consent) third persons in whom the estate has vested of their proprietory rights ' (p. 329) and then specifies four exceptions to this rule. It is submitted with great respect that the Privy Council decision is most unsatisfactory and does not correctly interpret the words of the Mayūkha and the spirit underlying it. The Mayūkha is here explaining the words of Vasiṣṭha ' anyatrānujñānād--bhartuḥ ' and is obviously combating the view of the Benares lawyers represented by Nanda Paṇḍita (vide p. 116 n. 2 above) that a widow cannot adopt at all or without an authority from the husband. But there is nothing to show that he establishes the proposition that even a widow in a joint Hindu family can adopt not only without authority from her husband but also without the authority of (and even against the wishes of) her husband's undivided father or brothers. The noble Lords say ' The Mayūkha and the Kaustubha which govern the Mahratta school regard adoption by a widow as a religious duty which does not require the authority either of the husband or of his kinsmen ' (35 Bom. L. R. 200 at p. 209). But this is entirely wrong since the Mayūkha expressly says, (p. 117 ll. 4-5) in the case of a widow adoption takes place even without it (i. e. husband's permission) *with the assent of the father and failing him with that of the kinsmen.* ' The Privy Council ignore these words of the Mayūkha and also forget what Kātyāyana (quoted by the the Mayūkha) expressly says about the widow engaging in religious acts without permission. Vide *Sidappa* v. *Ningangauda* 16 Bom. L. R. 663 and *Yeshvadabai* v. *Ramchandra* 29 Bom. L. R. 1320. where Payappa's case has been followed; but see *Sangangauda* v. *Hanmantgauda* 33 Bom. L. R. 1225 (where it was held that if a person dies leaving his widow and a son and that son dies leaving a widow, the power of the mother to adopt is at an end and cannot be revived even by the consent given by the son's widow) and *Shivappa* v. *Rudrava* 34 Bom. L. R. 539.

The above is said in the Mitākṣarā[1]. It is proper to hold that this is the purpose of this text, since any other purpose is impossible. ***Durebāndhavam*** (in Vasiṣṭha) means 'one of another caste'.

My* venerable father says that even one who is married or who has had sons may be taken in adoption. And this is proper, since there is nothing opposed (to this view).

As regards (the verses of) the Kālikāpurāṇa;

> Oh king,[2] that son, whose saṁskāras (purificatory ceremonies) up to (i. e. including) *cūḍā* (tonsure) have been performed with the *gotra* (famify name) of his (natural) father, does not (i. e. cannot) attain the status of the (adopted) son of another. When the ceremonies of *cūḍā, upanayana* (investiture with the sacred thread) are performed under his own *gotra* (by the adoptive father), the *dattaka* and the other kinds (of sons) become (recognised as) sons in the adoptive family, otherwise they are called dāsa (slave). Oh king! after the fifth year (from birth) the adopted sons and the rest cannot be (recognised as) sons. Having taken (in adoption) one who is five years old one (the adopter) should first perform the *putreṣṭi*.[3]

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1. The Mit. on Yāj. II. 132 after quoting Manu 9. 182 says that the text is meant to forbid the adoption of another when it is possible to adopt a brother's son and that the text does not lay down that a brother's son is one's own son for all purposes, as such an hypothesis would be opposed to the rule laying down that one's widow, daughter and daughter's son succeed before a brother's son.

2. This passage of the Kālikāpurāṇa is quoted in *Gangasahai* v. *Lekhraj* 9 All. 253 at p. 306, where also the two translations of Sutherland and Colebrooke (of this passage) are set out and that of Sutherland approved. At p. 316 the comment of the Mayūkha about the passage being of doubtful authenticity is quoted and it is held that the authenticity of the passage is extremely doubtful (p. 318). In *Raja Mukund* v. *Shri Jagannath* 2 Patna 469 at p. 477 the passage of the Kālikāpurāṇa is referred to and it is held that a boy may be adopted till his *upanayana* and that it does not matter if the *Cūḍā* ceremony is performed in the family of birth and that *putreṣṭi* is omitted at the time of adoption. Vide also *Chandreshwar Prasad* v. *Bishehwar Pratap* 5 Patna 777 at p. 844 (where the passage of the Kālikāpurāṇa as to five years was held not binding).

3. These verses of the Kālikāpurāṇa state four propositions, viz. (1) if all saṁskāras from jātakarma to cūḍā (i. e. including cūḍā) have been performed in the family of the birth, that boy cannot be adopted in another family; (2) if a boy's *cūḍā* and later ceremonies are performed in the adoptive family he is fully an adopted son; (3) a boy over five years of age cannot be adopted at all; (4) a boy up to five years (but not more) whose cūḍā was performed in the family of birth may be adopted, provided the *putreṣṭi* is performed first before any other saṁskāras are performed in the family of adoption. The *cūḍā* was performed generally in the third year and the tufts on the head were kept according to the *pravaras*. Vide Manu II. 35, Āp. Gṛ. S. VI, 16. 3, 6--7 and notes to V. M. p. 187. According to Pāṇini (II. 1. 13) ā is used in the sense of exclusive limit (*maryādā*) and inclusive limit (*abhividhi*). Vide notes to V. M. p. 188 for the conflict if *ā* were taken in the sense of *maryādā*. Nil. says that these verses apply, if at all, to the adoption

* P. 114 (text).

That passage refers to one who is not of the same *gotra*. In the word '*ācūḍāntam*' '*ā*' is used in the sense of 'inclusive limit', since if it were taken in the sense of 'exclusive limit' there would be conflict with the verse 'when the ceremonies of *cūḍā* and *upanayana* &c.' This text, however, should not be much relied upon, since it is not found in two or three copies of the Kālikāpurāṇa.

The *dattaka* (adopted) son is moreover of two sorts, *kevala* (simple) and *dvyāmuṣyāyaṇa* (the son of two fathers). The former is one who is given with out any condition, while the other is one who is given with the condition 'this son belongs to us both'.[1] Of these the former should perform the obsequial rites, s'rāddhas and the like of the adopter alone (and not of the natural father). To explain. The acceptance (the ceremony of) adoption) of a son requires a *bhāvya* (the goal to be accomplished) to be

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of a boy who is not of the same gotra. His real view is that these verses are without authority and probably spurious. In *Dharma* v. *Ramakrishna* I. L. R. 10 Bom. 80 it is said (at p. 84) that Nīlakaṇṭha's interpretation of the *Kālikāpurāṇa* passage as referring to *asagotra* boy causes a difficulty, but 'it does not, we think, follow that because he explains the text and comments upon it, he therefore adopts it'. At p. 86 the conclusion reached is 'we must hold therefore that the adoption of a married *asagotra* brāhmaṇa is not prohibited by the Hindu Law in force in this presidency'. In *Kalgauda* v. *Somappa* 33 Bom. 669=11 Bom. L. R. 797 (where a married Hindu having a son was given in adoption) it was held that he alone passed into the adoptive family and that his son born before adoption remained for purposes of inheritance in his natural family. In *Advi* v. *Fakirappa* 42 Bom. 547 it was however held that a son who was in the womb when his father was adopted passed into the adoptive family with his father. In *Viraragava* v. *Ramalinga* 9 Mad. 148 (F. B.) it was held that (in South India) a brāhmaṇa of the same *gotra* may be adopted after *upanayana* but before marriage. *Lingayya* v. *Chengalammal* 48 Mad. 407 holds following the Dattaka-candrikā that even a s'ūdra cannot be adopted after his marriage.

1. Some writers (such as Mandlik, Hindu Law p. 503) were of opinion that the dvyāmuṣyāyaṇa form had become obsolete. But decisions of courts hold otherwise. In *Basava* v. *Lingangauda* 19 Bom. 428 at p. 467 Jardine J. was not inclind to hold that the dvyāmuṣyāyaṇa son was obsolete in this age in the southern parts of the Bombay Presidency. In *Srimati Uma Deyi* v. *Gokoolanund* 5 I. A. 40 (= 3 Cal. 587) this form was recognised and it was said (at p. 51) 'to constitute a dvyāmuṣyāyaṇa there must be special agreement between the two fathers'. In *Chenava* v. *Basangavda* 21 Bom. 105 it was held that the practice is prevalent among Lingayats. In *Vasudevan* v. *Secretary of State* 11 Mad. 157 it was held that on the Malbar Coast among the Nambudri brāhmaṇas the dvyāmuṣyāyaṇa is the ordinary form of adoption. The power of adopting in this form is not confined to brothers but may be exerised by their widows (vide *Krishna* v. *Paramashri* 25 Bom. 537 = 3 Bom. L. R. 73). In *Laxmipatirao* v. *Venkatesh* 41 Bom. 315 (= 19Bom. L. R. 23) It is said that whether it is a brother's son or any one else that is adopted an express stipulation that the boy is to be the son of both is necessary (at p. 334 the passage of the Mayūkha is quoted). Vide also *Huchrao* v. *Bhimarao* 42 Bom. 277 (= 20 Bom. L. R. 161). In *Behari Lal* v. *Shib Lal* 26 All. 472 the natural mother of the dvyāmuṣyāyaṇa son was preferred as an heir to a *bandhu* of the adoptive father. In *Basappa* v. *Gurulingawa* 35 Bom. L. R. 75 it was held that on the death of an unmarried dvyāmuṣyāyaṇa adopted son his adoptive mother and natural mother both inherited as heiresses.

stated and (therefore) in the passages prescribing that (the adoption of a son) such as ' one about to take a son in adoption ' &c (Vasiṣṭha Dh. S. 15. 6), the son is stated to be the *bhāvya*[1] by the word ' putram ' being used in the accusative case. And it is not possible (in the case of adoption) to cause a son to be in the same sense in which a male child is born. Therefore by the word ' putra ' (in Vasiṣṭha's text and similar ones on adoption) all the purposes served by a son are to be figuratively understood and the adṛṣṭa (the unseen result) that urges one to perform that (act of adoption) must be accepted as the *bhāvya* (in the passages laying down adoption). Therefore (on the adoption taking place) those actions* which spring from such special relationship as that of father and son take place in the adopter's family (so far as the adopted boy is concerned). Therefore is it that Manu (9. 142) says :[2]

1. *Bhāvya* literally means ' what is to be made to exist or what is to be caused to be. ' As we say 'yāgena svargam bhāvayet' (one should cause svarga to be by means of sacrifice), where the goal to be accomplished (svargam) is put in the objective case, so in Vasiṣṭha's text *putram* is in the objective case and is the *bhāvya* of the rite of adoption. But the boy to be adopted already exists, he is not to be brought into existence literally. Hence the word ' putram ' is to be taken in a figurative sense as indicating all the purposes served by a son (i. e. paying off a debt, freedom from *put* hell &c.). When we cannot take the expressed or literal sense (s'akya or vācya sense), *lakṣya* sense is to be taken. Therefore what is meant is ' by the ceremony of adopting a son one should accomplish the adriṣṭa (the unseen results) to be secured by means of a son '. The promise of heaven in the Vedic texts prompts a man to perform a sacrifice and so the latter is said to be the *prayojaka* (what incites or prompts to an act). Similarly the *adṛṣṭa* brought about by the adoption of a son is the *bhāvya* and the *prayojaka* of the ceremony of adoption. Vide notes to V. M. pp. 188--189.

2. Manu IX. 142 and Nīlakaṇṭha's explanations of *piṇḍa* and *svadhā* are quoted in *Lallubhai* v. *Mankorabai* I. L. R. 2 Bom. 388 at p. 424 and at pp. 425--426 it is proved by quotations from the Saṁskāramayūkha that Nīlakaṇṭha accepted Vijñānes'vara's explanation of the word *sapiṇḍa*. In *Sri Rajah Venkata Narasimha* v. *Sri Rajah Rangayya* 29 Mad. 437 at p. 449 the words of the Mayūkha from ' therefore is it that Manu says ' up to ' co-extensive with the two ' are quoted and it is said ' we do not think that there is anything in these passages which necessarily carries with it the idea that the adopted son is divested of property which is his own absolutely at the time of adoption '. In *Dattatreya* v. *Govind* 40 Bom. 429 (where a person in whom property had become vested as the sole surviving male in the family was given in adoption into another family) it was held, dissenting from 29 Mad. 437, that a person on adoption lost all rights to the property of his natural family that had already become vested in him before adoption. At p. 433 the verse of Manu is translated and it is said (at p. 434) ' there is no room for the distinction that the prohibition against taking is confind to the inheritance after the adoption and does not extend to what is already inherited before adoption............The words are wide enough to include the estate vested in him at the time of his adoption, provided it is the estate of his natural father.' It is submitted with great respect that this Bombay decision is wrong and is opposed to two Mīmāṁsā rules of interpretation, viz. about *vākyabheda* and about *bhūta* (already existing things or facts) and *bhavya* (future things or state of facts). Vide above p. 112*n* 1 and p. 121*n* 1 for the latter maxim and pp. 37, 38 of my ' Brief Sketch of the Pūrva-mīmāṁsā system ' for an exposition of how these faults are committed by the Bombay decision. In 29 Mad.

* P. 115 (text).

The son given shall not have (share) the family name (***gotra***) and the wealth (***riktha***) of his natural father ; the piṇḍa (the cake offered to deceased ancestors) follows the family name and the wealth ; of him who gives (his son in adoption) the ***svadhā*** (the obsequies) cease (so far as that son is concerned).

Gotrarikthānugaḥ (in Manu) means ' that follows the ***gotra*** and riktha (estate) ' i. e. it is generally co-existent with the two (***gotra*** and ***riktha***). ***Dattrima*** (in Manu) means the simple (***kevala***) adopted son, since it will be stated later on that in the case of the ***dvyāmuṣyāyaṇa*** the family name (***gotra*** of the natural futher) and the rest do persist

437 at p. 440 one of the Mīmāṁsā doctrines appears to be tacitly employed. The Bombay decision in *Mahableshwar* v. *Subramanya* 47 Bom. 542 (= 25 Bom. L. R. 274) seems to be opposed in principle to the decision in 40 Bom. 429. In 47 Bom. 542 where a father and his four sons partitioned family property and then one of the sons was given in adoption to another person, it was held that the son so adopted was not divested by the adoption of the property he took on partition. In *Shyamcharan* v. *Shricharan* 56 Cal. 1135 it was held following 29 Mad. 437 that a man who had inherited property from the family of birth was not divested of it on being subsequently adopted by another man. In *Manikbai* v. *Gokuldas* 49 Bom. 520 (=27 Bom. L. R. 414) it was held that where a person, who is the sole surviving coparcener in his natural family and has a daughter then living, is adopted into another family, his estate in his natural family vests in his daughter on his adoption. This case refers to both 40 Bom. 429 and 47 Bom. 542 with approval. It is extremely difficult to reconcile the three Bombay cases. In *Raghu Raj Chandra* v. *Subhadra Kunwar* 55 I. A. 139 at p.148 the case in 40 Bom. 429 is apparently cited with approval,but in a different connection. Vide 56 Cal.1135 at p. 1139. In the very recent case of *Bai Kesarba* v. *Shivsangji* 34 Bom. L. R. 1332 Patkar J in an elaborate judgment holds that 40 Bom. 429 was correctly decided and follows it. At p. 1340 the verse of Manu is quoted and translated (the reading ' na haret ' being accepted as meaning ' shall not take '), at pp. 1341-42 the gloss of the Mayūkha on that verse is quoted and on p. 1342 the conclusion is reached that ' the *gotra* so (i. e. by birth) vested in the son ceases after the son is given in adoption....The *gotra* and *riktha* (the estate) are inextricably joined together in a *dvandva* compound and it would follow logically as well as grammatically that the adopted son must lose both together and cannot lose the former and keep the latter'. The learned judge does not however meet the two objections based on the Mīmāṁsā stated above, nor does he correctly understand the Mayūkha. The Mayūkha does *not make* a sweeping assertion that all connection of the son given in adoption with the family of birth ceases. All that the Mayūkha says is that the verse of Manu is not to be taken literally, but that it indicates the cessation of all those consequences that are due to connection *with the piṇḍa* in the case of the *natural father* and the rest. The Mayūkha *does not expressly* say anything about the cessation of property already taken, nor about the cessation of the *gotra* for purposes other than the *piṇḍa*. As a matter of fact the *gotra* of the natural family has to be considered even after the adoption of a boy in another *gotra* for purposes of marriage. The same learned judge in another case observes ' the simple adopted son is not competent to marry within the prohibited degrees either in the natural family or in the adoptive family. The *sapiṇḍa* relationship therefore is recognised in both the families for the purpose of prohibition of marriage' *Basappa* v. *Gurulingawa* 35 Bom. L. R. 75 at p. 80. Thus there is no *total and absolute cessation of gotra* on adoption for all purposes, but only for those purposes in which the piṇḍa (rice-ball) enters. If that is so as to *gotra*, there is no reason why in the case of *riktha* also there is not to be a qualified cessation, viz. as to inheritance falling in after adoption.

(even after adoption), *Piṇḍa* (in Manu) means, according to Medhātithi, Kullūka and others, *s'rāddha* and the rites after death. Others say that *piṇḍa* means the *sapiṇḍa* relationship and *svadhā* means obsequial rites, s'rāddha and the like. Really speaking, just as in the text 'one who has male issue and whose hair are black may consecrate the sacred fire ' a particular stage of life (age) is indicated (and the words are not to be taken literally) or just as in the passage ' he (the priest) measures half outside and half inside the vedi (altar) ' a certain region (for planting the sacrificial post) is indicated, similarly [1] here also (in Manu 9. 142) the words *gotra*, *riktha*, *piṇḍa* and *svadhā* indicate all consequences whatever in relation to the natural father and the rest that are brought about by (their) connection with the piṇḍa and this passage conveys (by those words) the cessation of all those (consequences). From this follows also the cessation of the relation (of the boy given in adoption) to his full brothers, paternal uncle and the rest. Therefore[2] also the son born of the *kevala dattaka* (simple adopted son) should perform the *sapiṇḍīkaraṇa*, the *pārvaṇas'rāddha* and the like rites of his father (who was adopted) in conjunction with the adopter alone (and not with the natural father). Similarly his son also (i. e. the grandson of the adopted man).[3]

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1. The passage of the Mayūkha from this place to the words ' paternal uncle and the rest ' is quoted in *Laxmipatirao* v. *Venkatesh* 41 Bom. 315 at p. 330 for the proposition that the connection of the adopted boy with the natural family is severed except for marriage up to certain degrees. In *Padma Coomari* v. *Court of Wards* 8. I. A. 229 at p. 246 it was held that an adopted son succeeds lineally as well as collaterally and in *Kali Komul* v. *Umashankar* 10 I. A. 138 it was held that an adopted son succeeds to the brother of his adoptive mother ; vide *Dattatraya* v. *Gangabai* 46 Bom. 541 for a similar proposition. But in *Bhausaheb* v. *Ramgauda* 25 Bom. L. R. 813 it was held that a person who is adopted into another family cannot succeed to the property of his maternal grandfather in his natural family.

2. This sentence is quoted in 11 Bom. L. R. 797 at p. 809 (=33 Bom. 669).

3. Nīlakaṇṭha does not approve of the literal and forced interpretations of *piṇḍa* and *svadhā* given by others. Nīlakaṇṭha as is often the case cites two illustrations from the Pūrvamīmāṁsā. Consecration of sacred fires is enjoined in such Vedic passages as ' a brāhmaṇa should consecrate fires in spring &c. ' There is the passage ' one who has had sons and who has black hair &c. ' As consecration of fires has already been ordained, this passage only prescribes some detail about it. If the passage be construed literally as laying down both conditions (having sons and having black hair), there would be two *vidhis* in one sentence (i.e. there would be *vākya-bheda*) which is a blemish (vide above p. 121*n*. 2). A man may have no son till his hair turns grey and then he cannot consecrate fires if the literal sense were taken. So by lakṣaṇā (by indication) all that the two words mean is that vigorous manhood is the time for consecration of fires (i. e. one must not be a mere youth nor old). Lakṣaṇā, which is only a fault (if any) of words is to be preferred to vākyabheda which is a fault of sentence. Similarly the words ' he measures half inside &c. ' are not to be taken literally, but only as indicating the region where the post is to be planted. Vide Jaimini III. 7. 13--14 and notes to V. M. pp. 190--191. So in Manu's verse the words piṇḍa, svadhā and the rest are not to be taken literally. There is on adoption not only severance from the natural father as regards *gotra*, estate, *piṇḍa*, but there is a severance for all purposes with the natural father's family. S'rāddhas are subdivided in

After starting the topic of ***dvyāmuṣyāyaṇas*** (sons of two fathers) with the words ' Now if sons, whether adopted, purchased or born of appointed daughters (***putrikā***), become devoid of ***pravara*** (i. e. lose the ***pravara*** and therefore the ***gotra*** they had by birth) on account of their being accepted by another (as his), they become dvyāmuṣyāṇas ', as to what Kātyāyana (then) says[1] ' if they (those who take ***dattaka*** &c.) have no issue born of their wives, then these (sons, ***dattaka***, purchased, putrikāputra) shall take the estate and offer piṇḍa to them up to three ancestors ; and if both (the person taking and the person giving) have no issue, they (the dattaka, the purchased, the putrikāputra &c.) shall offer (piṇḍa) to both ; in one and the same ***s'rāddha*** he (the son adopted, purchased &c.) should repeat both the giver and the taker, after having separately intended (the same piṇḍa for both), up to the third ancestor ', that has reference to the dvyāmuṣyāyaṇa (and not to the simple adopted son), since* the opening words are ' they become dvyāmuṣyāyaṇas '. Therefore the dvyāmuṣyāyaṇa, when the natural father or the adoptive father has no other son, should offer the piṇḍa to him and take the estate, but not when another son exists ; when, however, both (the natural father and the adoptive father) have ***aurasa*** (legitimate) sons, he (the dvyāmuṣyāyaṇa) should give ***piṇḍa*** to none (of the two fathers) and should take a fourth part of the share that belongs to the ***aurasa*** son of the adopter, since Vasiṣṭha (15. 9) says ' if after a son is taken in adoption, an ***aurasa*** (son of the body) be born, he (the adopted son) shall be the recipient of a fourth share ' and since Kātyāyana says :

various ways. One division is into *pārvaṇa* and *ekoddiṣṭa*. Pārvaṇa s'rāddha is one that is offered on a *parvan* i. e. on amāvāsyā (new moon), full moon &c. It is performed with special regard to three paternal ancestors with whom are associated the wives of the three paternal ancestors and the three male ancestors of one's mother and their wives also are invoked in this s'rāddha. The ekoddiṣṭa is performed for a single person. Sapiṇḍīkaraṇa is a rite performed for a deceased person at the end of a year from death or on the 12th day from death, whereby from being a *preta* he is raised to the position of a *pitṛ* and shares the rice cakes along with the ancestors. The son of the *kevala dattaka*, according to Nīlakaṇṭha, is to offer in the pārvaṇa &c. piṇḍas to his father, the adopted man, to the adopter alone (as his grandfather) and to the adopter's father, but not to the natural father (of the adopter) and the latter's *father*. Similarly the grandson of the *kevaladattaka* offers piṇḍas to his father (son of the man adopted), his grandfather (the man adopted). and to his great-grandfather (the person adopting), but not to the natural father of the man adopted, though the latter also is in a way a great-grandfather.

1. This passage is variously read by Haradatta, Bhaṭṭoji and others. When offering one piṇḍa, the dvyāmuṣyāyaṇa was to intend it both for the giver and the adopter whose names he was to repeat, the second for the father of the giver and of the adopter and so on. According to some writers two piṇḍas were to be offered to the giver and the adopter separately, two to their fathers and two to their grandfathers. Vide notes to V. M. pp. 193-194. In a well-known verse, several means for arriving at the correct purport of a passage are laid down, viz. *upakrama* (opening words) and *upasaṁhāra* (concluding words), abhyāsa (reiteration), *apūrvatā*, *phala*, *arthavāda* and *upapatti*. Nīlakaṇṭha here relies on the first means (upakrama).

* P. 116 (text).

If an *aurasa* son be born, the (other kinds of) sons take the fourth share, provided they belong to the same caste; but those (secondary sons) who do not belong to the same caste (as that of their father) are entitled to food and raiment (alone).

The reading of the Kalpataru is ' take the third share '. Vijñāneś́vara says [1] that ' *savarṇāḥ* (in the verse of Kātyāyana) means ' the *kṣetraja*, the *dattaka* and the like '. When both (the adopter and the giver of the dvyāmuṣyāyaṇa) have no (other) son, he (the dvyāmuṣyāyaṇa) should perform a single ś́rāddha only for both (giver and adopter) in the manner already declared above in the words ' in one and the same ś́rāddha &c. ' As to what Kārṣṇājini (quoted) in Hemādri says:[2]

Whoever may be the members belonging to the respective families of the fathers (natural and adoptive), the adopted sons and the rest should perform their conjunction (*sapiṇḍīkaraṇa*) on their death with the *pitṛs* in the respective families (of birth or adoption). The sons of them (of the dattaka and the rest) should perform (the sapiṇḍīkaraṇa

1. The Mit. on Yāj. II. 132 gives this explanation of *savarṇāḥ* and explains asavarṇāḥ as ' kānīna, gūḍhaja, sahoḍha, and paunarbhava. '

2. These verses have been variously explained by Kamalākara, Hemādri and others. Vide notes to V. M. pp. 194--197 for detailed explanation. The sapiṇḍīkaraṇa of a deceased person is always made with reference to his three immediate paternal ancestors. If a person dies in the natural father's or adoptive father's family of the *dattaka* and he has to perform the *sapiṇḍīkaraṇa* of that man then he (the dattaka) should associate the deceased with the latter's three ancestors. If the *dattaka* is himself dead, his sapiṇḍīkaraṇa has to be performed by his son with the three ancestors of the dattaka, father, grandfather and great-grandfather. But he had two fathers (natural and adoptive). So in the place of the father of the dattaka, two names (of the natural and adoptive fathers) are to be repeated when offering the piṇḍa for the father of the dattaka. If the grandson of the dattaka has to perform the sapiṇḍana of his own father (i. e. of the son of the dattaka), then the dattaka will be the father of the deceased and the grandfather of the deceased would be the natural and adoptive fathers of the *dattaka*. Nīlakaṇṭha says that it is only the natural father of the dattaka whose name is to be taken as the grandfather (when the deceased is the son of the dattaka). When it is the great-grand-son of the *dattaka* who has to perform the sapiṇḍana of his deceased father (i. e. of the grandson of the *dattaka*), the father of the deceased is the son of the *dattaka*, the grandfather is the *dattaka* himself and the natural and adoptive fathers of the dattaka occupy the place of great-grandfather. The question is whether in the sapiṇḍana of the grandson of the *dattaka* by the great-grandson, both names are to be repeated with reference to the piṇḍa for the great-grandfather. The answer is that there is an option, viz. the name of the natural father of the *dattaka* must be taken as the great-grandfather of the deceased grandson of the dattaka, but the name of the adoptive father of the dattaka may or may not be taken with reference to the piṇḍa for the great-grandfather. The words ' eṣā tripauruṣī ' are capable of several meanings. According to Nīlakaṇṭha they seem to mean that the relationship due to *piṇḍa* extends only up to three generations i. e. the adopted son, his son and grandson are connected with the adoptor by piṇḍa relation, but the great-grand-son of the adopted person is not so connected with the adoptive father.

of the dattaka) with two (natural and adoptive fathers), while the grandsons of them (of the *dattaka* and the rest) should perform (the sapiṇḍīkaraṇa of their father, the son of the dattaka) together with one (i. e. the dattaka). As regards the fourth generation (i. e. the great-grandson of the *dattaka*), there is an option. Therefore this *piṇḍa* relationship extends to three generations only. *On days (such as new moon) common (to all deceased ancestors for performing s'rāddha) there is no distinction as regards members of the groups (of the dead on the natural father's side or the adoptive father's side), but on the day of the anniversary of death they (the *dattaka* and the rest) should perform according to the prescribed rules the s'rāddha with reference to one (deceased person) only.

that also has the same import as the text of Kātyāyana (discussed above). The meaning is as follows. The *dvyāmuṣyāyaṇa* adopted son and the like should perform the sapiṇḍīkaraṇa of persons dying in the families of their natural father and their adoptive father with members of their own group, viz. their fathers and the rest; but the sons of the adopted son and the like should perform (the sapiṇḍīkaraṇa) of the latter in conjuction with both the natural and adoptive fathers. The grandsons of them (of the dattaka &c.) also (should join) their (deceased) father with the dattaka, who is their grandfather and with the natural father of the dattaka (who is their) great-grandfather. *Caturthe puruṣe* (as to the fourth generation) means ' as regards the great-grandson of the dattaka '. *Chandaḥ* means ' volition '. (The meaning is that) the great-grandson of the dattaka performing the sapiṇḍana of his own father i. e. grandson of the dattaka may repeat the name of the adoptive father or not, but he must repeat (or invoke) the name of the natural father (of the *dattaka*). At the new moon and other times that are *sādhāraṇa* (common, i. e. when one may perform a s'rāddha for all ancestors &c.) s'rāddha should be offered to members of the families of the natural and adoptive fathers, while on the day of the anniversary of death a s'rāddha called *ekoddiṣṭa* should be performed with reference to one (deceased) person only.

Some, however, say that there is no such thing as a *kevaladattaka* (a simple adopted son), because there is no text containing a positive injunction about him, and further that, since there is no text positively prescribing the condition ' this son belongs to us both ', a son taken (in adoption) even without such a condition is still a *dvyāmuṣyāyaṇa* and that by him two s'rāddhas or one s'rāddha intended for both the natural and adoptive fathers should be performed on the day of the new moon and the like, while the son of him (of the adopted man) should perform the *sapiṇḍīkaraṇa* and the *pārvaṇa-s'rāddha* and the rest for the adopted man (when dead) in conjunction with both the natural and the adoptive fathers

* P. 117 (text)

and that the same holds good with reference to the son of that (son of the *dattaka*). This requires consideration (i. e. this is not quite correct). Although the *kevaladattaka*[1] has not been mentioned anywhere expressly by that very word, yet he (the *kevaladattaka*) does follow (is established as a separate entity) by implication from the fact that the text of Manu (9. 142) already mentioned declares the cessation of all connection (of the son given in adoption) with the natural father and others and that this (cessation of all connection) is wanting in the case of the *dvyāmuṣyyaṇa.*[2] Moreover, the text of Gautama (Dh. S. 4. 3) (one should marry a person who is) ' beyond the seventh from out of the relations of the father and of the actual procreator and beyond the fifth from out of the relations of the mother' lays down a prohibition of marriage up to the seventh degree in the family of the procreator, which (prohibition) would be superfluous as regards the dvyāmuṣyāyaṇa, since in him there does exist (according to all writers) sapiṇḍa relationship (with the procreator). Hence in order to give this (passage of Gautama) its full meaning (or purpose) the (existence of the) *kevaladattaka* (as separate from *dvyāmuṣyāyaṇa*) must be admitted, since as regards him the cessation of the sapiṇḍa relationship is declared (in the text of Manu). And moreover there is a conflict between the following (verse) from the *Pravarādhyāya*[3]:

1. The passage from this line to the sūtra of Gautama and the comment thereon is referred to in *Ramangauda* v. *Shivaji* (1876) P. J. p. 78 for the proposition that the marriage of a brāhmaṇa with his sister's daughter is void on the ground of *sapiṇḍa*-ship in the absence of special custom.

2. Nīl. is quite right here. His argument is that when Manu speaks of complete cessation of connection with the natural father he is speaking of a kevala dattaka, though he does not use that word, since all texts are agreed that as regards the *dvyāmuṣyāyaṇa* there is no such complete cessation.

Gautama's sūtra is similar to what Yāj. (1. 53) and Manu (3. 5) say ; Gautama, however introduces the word ' bījinaḥ ' after the word ' pitṛ-bandhubhyaḥ '. In ancient times there were several secondary sons, such as *kṣetraja*, *putrikāputra* &c. Therefore it was possible to find that one person was in law the father of a person, while the actual progenitor was another, as e. g. in the case of *niyoga*, the son born of a woman belonged to her husband, while the actual procreator (*bījin*) might have been the husband's brother, or *sagotra* or some one else. Therefore Gautama laid down that prohibition on the ground of sapiṇḍa relationship in marriages extended up to seven degrees on the legal father's side as well as on the procreator's side. It is however not easy to see how this sūtra helps Nīl. in establishing the existence of *kevala dattaka*. Gautama is not laying down here a new rule unknown from another source. He simply summarises the rules deducible from the practices of the *śiṣṭas* of his day and therefore this sūtra must be regarded as a mere reiteration, just as his sūtra about ownership was held by Nīl. to be a mere reiteration of what was well-known.

3. In the S'rauta sūtras there is a chapter on pravaras. Whence this verse is quoted it is difficult to say. A man cannot marry a girl born of the same *gotra* as his. Some *gotras* have only one *pravara*, some have three and some have five *pravaras*. The *gotras* may be different, but one or more pravaras may be common to two *gotras*. A man cannot marry a girl whose father's *pravara* is the same as his. *Pravaras* are those sages whose names are invoked by the sacrificer at the time of selecting priests at a sacrifice or

*P. 118 (text).

those who are ***dvyāmuṣyāyaṇas*** such as those adopted or bought cannot marry in both ***gotras*** just as in the case of S'auṅga-S'ais'iri.

which declares that the dvyāmuṣyāyaṇa has both ***gotras*** and the verse of Manu (9. 142) which declares (in the case of the adopted son) the cessation of the ***gotra*** of the natural father ; this conflict can be removed only by (postulating) a distinction (of ***dattaka***) into ***kevala*** (***dattaka***) and dvyāmuṣyāyaṇa. For these (three) reasons the (existence of the) ***kevaladattaka*** also is established.

It is for this reason (i. e. on account of the distinction between ***kevaladattaka*** and *dvyāmuṣyāyaṇa*) that, after declaring on the strength of the text of Manu the cessation of ***sapiṇḍa*** relationship between Arjuna, the son of Kuntī who was given as an adopted daughter to Kuntibhoja by S'ūra, and Subhadrā, a daughter of Vasudeva son of S'ūra, and after declaring that this passage of Gautama (4. 3) is merely concerned with the prohibition (in marriage) of even a girl born in the line of (***santāna***) the procreator, and after raising the doubt that Subhadrā was not fit to be married by Arjuna, Bhaṭṭa Somes'vara puts forward the explanation (refuting the doubt), viz. the assumption of a distant relationship, which (explanation) was offered in the Vārtika[1] (viz. the Tantravārtika of

they are, according to others, the ancestors of the founders of each *gotra*. S'ais'iris are a sub-division of the Katas, who are a branch of the Vis'vāmitra *gotra*, while the S'uṅgas are a subdivision of the Bhāradvāja *gotra*. On the wife of a S'auṅga a S'ais'iri begot a son by *niyoga*. The descendants of the son so begotten came to be called S'auṅga-S'ais'iris and they could not marry in both *gotras* viz. Bhāradvāja and Vis'vāmitra. Vide notes to V. M. p. 199. The argument of Nīlakaṇṭha is that the conflict between the verse from the *pravarādhyāya* and that of Manu leads to the inference that they refer to distinct kinds of *dattaka* (i. e. there is a viṣayavyavasthā) viz. dvyāmuṣyāyaṇa and *kevala*.

1. Mandlik (p.62) in his translation makes a mess of this somewhat difficult and involved passage. He had apparently no clue to what the Vārtika was and what Somes'vara said. His translation 'by an explanation founded on a Vārtika text that there was no relationship (between Arjuna and Subhadrā) after the adoption ' is absurd. Mr. Gharpure (p. 86) follows him almost word for word. The Vārtika is the Tantravārtika of Kumārila and Bhaṭṭa Somes'vara is the author of a learned commentary on the Tantravārtika, called Nyāyasudhā (or Rāṇaka). The Tantravārtika enters into an elaborate discussion (pp. 128--138) about the lapses from good conduct attributed to ancient sages and epic heroes. The charge brought against Vāsudeva (Kṛṣṇa) and Arjuna is that they married their own maternal uncle's daughters, Rukmiṇī and Subhadrā respectively, which is forbidden. From ancient times there was a conflict of views as to marrying one's maternal uncle's daughter. Baudhāyana (Dh. S. I. 1. 17--24) says that this was practised by the southerners and condemns it himself. But some southern writers like Mādhava and the author of the Smṛticandrikā defend the practice. S'ūra had a son Vasudeva and a daughter Pṛthā. He gave Pṛthā in adoption to his paternal aunt's son Kuntibhoja (Mahābhāratā Ādi. 111. 1-3). The son of Pṛthā (or Kuntī) was Arjuna. Subhadrā is spoken of as the daughter of Vasudeva and sister of Vāsudeva (Kṛṣṇa). Vide Ādiparva 219. 17--18. Arjuna married Subhadrā, who was thus his maternal uncle's daughter if the texts are to be taken literally. But a maternal uncle's daughter is a very

Kumārila). As to what a writer says ' Somes'vara on the strength of Gautama's text declared that Kunti had *sapiṇḍa* relationship for seven generations in the family of S'ūra also ', that remark arises from not (carefully) studying the work (of Somes'vara). For, he (Somes'vara), having first referred to the cessation of sapiṇḍa relationship (on the strength of Manu), spoke of the text of Gautama as meant to prohibit (marriage) in the family of the progenitor, but not as conveying that there was sapiṇḍa relationship (of the adopted for seven generations in the family of birth).

Thus the two kinds (of adopted sons), ***kevala*** and ***dvyāmuṣyāyaṇa***, being established, the condition also ' this belongs to us both, ' is established (in the case of the ***dvyāmuṣyāyaṇa***), since it has an evident (visible) purpose, viz. that the adopter may know that he (the son taken) is the son of two fathers.

*And the simple adopted son (***kevala dattaka***) has ***sapiṇḍa*** relationship for seven generations in the family of the adoptive father (***pālaka-pitṛ***) and for five generations in the (adoptive) mother's family.

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near *sapiṇḍa* (being third from the common ancestor). Vide Yāj. I. 52--53. The answer of the Tantravārtika is that Subhadrā was not a real sister of Vāsudeva, but only his cousin, such as a maternal aunt's daughter. In popular language such a female cousin is called sister and Somes'vara notes that among the Lāṭas (people of southern Gujarat) that was the case in his day. This assumption of a distant relationship in Subhadrā to Vāsudeva (saṁbandha--vyavadhāna-kalpanā) is the explanation that Kumārila offers as against the charge that Arjuna married his maternal uncle's (Vasudeva's) daughter. Not being the real sister of Vāsudeva, she was not the daughter of Vasudeva. Some urged that Kuntī being given in adoption, there was cessation of her relationship with the family of her natural father S'ūra and his son Vasudeva according to Manu (9. 142) and so her son Arjuna could very well marry Subhadrā even if she was the real sister of Vāsudeva and the daughter of Vasudeva and there was no necessity to assume that she was a cousin only. This view of some quoted by Somes'vara is referred to by Nīl. in the words ' after declaring the cessation...son of S'ūra '. This view is met by the argument that, though Pṛthā was adopted by Kuntibhoja, still there is an express prohibition in the text of Gautama(4·3) about marrying one within seven degrees in the line of the procreator (S'ūra, the natural father of Pṛthā here) and so if Subhadrā were really the daughter of Vasudeva, she would be *bījāsantānajā* with reference to Pṛthā's son and would be ineligible for marriage *(apariṇeyā)* with Arjuna. All this is compressed in the words ' after declaring ...and after raising the doubt....by Arjuna.' All this discussion serves the purpose of establishing that there are two kinds of dattaka, kevala and dvyāmuṣyāyaṇa. Pṛthā was *kevala dattaka* and so it could be urged that there was cessation of *sapiṇḍa* relationship. The words of Gautama simply prohibit in express terms a marriage with one born within certain degrees from the progenitor (but they do not positively say anything about sapiṇḍa relationship). Somes'vara himself held the view that Subhadrā was only a cousin of Vāsudeva (i. e. he assumed with Kumārila that there was *sambhandhavyavadhāna*) and so Arjuna was not guilty of marrying a maternal uncle's daughter. Vide notes to V. M. pp. 199--204 where the relevant passages from Kumārila and Somes'vara are quoted.

* P. 119 (text).

As regards what Vṛddha[1]—Gautama says :—

Those sons, viz. the ***dattaka***, the son purchased and the like that were made so with the adopter's ***gotra***, become members of the ***gotra*** (of the adopter) by the rites (of adoption), but ***sapiṇḍa*** relationship (between the adopter and the adopted) is not prescribed (as arising from the rites)

and as to what Bṛhan—Manu says :—

Sons given, purchased and the like have ***sapiṇḍa*** relationship with their natural father to the fifth and seventh [2] degrees, but they take the ***gotra*** of their adoptive father,

as regards also what Nārada says :—

Sons (secondary) are brought up in the respective ***gotras*** (of the adoptive fathers) just like (legitimate) sons for religious purposes; they are intended to participate in the share (of property) and in the funeral cake only, [3]

all these texts are without any authority [4] (i. e. they are spurious or apocryphal). Even if they be authoritative, they serve the purpose of propounding that the ***dvyāmuṣyāyaṇa*** has no ***sapiṇḍa*** relationship for seven generations in the family of the adoptive father, since as regards the simple adopted son (***kevala-dattaka***) sapiṇḍa relationship for seven generations in the adoptive father's family has been declared by the text of Gautama (Dh. S. 4. 3) cited above and since by the text of Manu (9. 142) the cessation of sapiṇḍa relationship in the natural father's family has been declared.

As regards the ***dictum*** of a respectable author in the ***Sāpiṇḍyanirṇaya*** ' a boy (given in adoption) whose ***upanayana*** and other purificatory ceremonies (***saṁskāras***) were performed with the ***gotra*** of the natural father* has ***sapiṇḍa*** relationship in the natural father's family for seven and five generations on the father's side and on the mother's side (respectively) and in the family of the adoptive father for three generations, since in the adoptive father there is (in such a case) absence of the status of being the procreator and of the status of being the author of investing with the sacred thread, which (two positions) bring about the status of being a ***pitṛ*** (father) [5]; while

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1. This passage of Vṛddha-Gautama (and Mandlik's translation) is referred to in *Valubai* v. *Govind* 1 Bom. L. R. 770 at p. 774 and the argument that 'gotratā' meant 'state of lineage' was not accepted. The words 'svagotreṇa kṛtā ye' may also mean 'who were adopted being of the same gotra (in their natural family) as the adopter's (*gotra*)'.

2. These words refer to the rule that *sapiṇḍa* relationship extends to seven degrees on the father's side and five degrees on the mother's.

3. The word 'only' suggests according to the D. M. that there is no sapiṇḍa relationship with the adoptive father, while according to the Sāpiṇḍya-mīmāṁsā quoted in the Nirṇayasindhu the word does not altogether negative that relation with the adoptive father, but negatives it for seven generations.

4. Ākara means 'the original and authoritative works on a s'āstra' and so 'anākarāṇi' means 'not found in any authoritative work (like Aparārka &c).'

5. One who initiates into Vedic study to which Upanayana leads is called *pitā*. Vide Manu II. 146.

* P. 120 (text).

one (adopted), whose (upanayana and other) *saṁskāras* are performed with the *gotra* of the adoptive father has sapiṇḍa relationship only with the adoptive father and the rest for seven and five generations', we do not know on what authority (or source) this dictum is based [1]. And morever, if the adoptive father has not the position of a *pitṛ* (father) on account of the absence of being the procreator and being the initiator into Vedic study (in the case of an adopted son whose *upanayana* was performed in the natural family), how is it that (it is said that) the *dattaka* has sapiṇḍa relationship (with the adoptive father) for three generations or how is it that he is to perform the s'rāddhas of the adoptive father and the rest ? Nor can it be said that being the *pitṛ* (in the primary sense) is necessarily co-existent with (or invariably concomitant with) sapiṇḍa relationship [2], so that when there is absence of *pitṛtva* (in the primary sense of being the procreator or the initiator into Vedic study), there would result the absence of *sapiṇḍa* relationship. As a matter of fact the *sapiṇḍa* relationship (of the adopted boy) with the adopter and the rest has already been declared by such texts of Gautama and the rest as ' beyond the seventh out of the father's relations ' (Gautama Dh. S. 4. 3). This is the direction (i. e. this will suffice to elucidate this topic).[3]

Now (begin) the rites of the gift and acceptance of a son. All (men) that have several sons have the power to give (in adoption) only that son

1. The Sāpiṇḍyanirṇaya is a work of S'rīdharabhaṭṭa, a paternal grand-uncle of Nīlakaṇṭha. One ms. of it in the Deccan College collection was copied in 1591 A. D. At the end of another ms. (No. 209 of 1882-83) it is called Sāpiṇḍya-dīpikā also. On account of this relationship Nīlakaṇṭha uses the plural and the word ' mānya ' (worthy of respect) with reference to the author. Vide notes to V. M. p. 206 for quotations from the work.

2. This sentence is quoted in 36 Bom. 339 at p. 350.

3. In the words from ' if the adoptive father ' ' Nīl. argues against the dictum of the Sāpiṇḍyanirṇaya. The argument of the latter work is that a man is called a *pitā* either because he procreates the son or because he performs his upanayana (which is as if a second birth). If a boy is adopted after *upanayana* the adoptive father cannot claim to be a *pitṛ* of that boy in any one of these two senses; then Nīl. asks, why should the Sāpiṇḍyanirṇaya yet say that there is *sapiṇḍa* relationship for three generations ? The Sāpiṇḍyanirṇaya might reply that where the adoption takes place after *upanayana*, there is *pitṛtva* in both ways in the natural father and so there is sāpiṇḍya with the natural father for seven generations and with the adoptive father only for three, as a piṇḍa is to be offered only to three paternal ancestors. Nīl. replies by saying that we cannot assert as an invariable proposition that where there is *pitṛtva* there is also sāpiṇḍya. That proposition fails in the case of the *kevala dattaka*, who, according to Manu, has no sāpiṇḍya with the natural father. Nīl. further says that conceding for argument's sake that when a boy is adopted after *upanayana* is performed in the family of birth, the adopter is not his *pitā* in any of the two ways mentioned above, it would not necessarily follow that there is no *sāpiṇḍya* between them, since as shown above *pitṛtva* and *sāpiṇḍya* are not invariably co-existent. He says that on adoption there is the same *sapiṇḍa* relationship between the adopter and the adoptee, whether it takes place before or after *upanayana* is performed in the natural family.

who is not the eldest;[1] while as regards accepting (a son) all to whom either no son was born or whose son is dead (have power); women whose husbands are alive (are entitled to adopt) with the permission of their husbands; failing husbands (women can adopt) with the permission of the (husband's) father and the rest.[2] In the case of s'ūdras a daughter's son or a sister's son must be taken in adoption and rot any one else; while by men of other classes a near *sapiṇḍa* (should be adopted), failing him, a remote *sapiṇḍa* (may be adopted), but not one belonging to another caste. The donor, on the day of adoption, having recalled the time (the year, month, tithi &c.), and having made the *saṅkalpa* (the religious and solemn declaration) ' I shall make a gift of my son for bringing about a cessation of those various consequences that are due to the relationship of father and son and the like mutually subsisting between me and others (on the one hand) and this son (on the other) and for the creation of those various consequences due to the various mutual relationships such as that of father and son and the like between the adopter and others (of his family on the one hand) and this boy (on the other), *should perform the worship of Gaṇes'a, *svastivācana*, the worship of the *Mātṛs* and Vṛddhis'rāddha [3]. The adopter, having observed a fast on the day previous to the day (fixed) for adoption, having summoned his relatives on the next day (after the fast), having informed the ruler of the (intended) adoption of a son, having recalled the time (year &c.), having made the *saṅkalpa* ' I shall adopt a son for bringing about the cessation of the various relationships of father and son and the like mutually subsisting between this boy who is going to be taken (in adoption) and his natural father and others and for[4] the creation of those various consequences (or obligations) that are due to the various mutual relationships of father and son and the like between us and ours (on the one hand and this boy on the other)' and having performed with (an appropriate) *saṅkalpa* (in each case) the worship of Gaṇes'a, *svastivācana*, the worship of the *Mātṛs*, Vṛddhis'rāddha, the choosing of an ācārya (priest for the ceremony), and the honouring of the ācārya with ear-ings, ring, two garments, a turban, *madhuparka*[5] and the rest, should feast three brāhmaṇas and his relatives. Then the *ācārya* having made the *saṅkalpa* ' I shall perform my duties (in this rite)', having performed the rites commencing with the marking out of lines on the altar and ending with the consecration of the fire (on the altar), having repeated (the texts) up to (including) ' cakṣuṣī ājyena'

1. In *Vyas Chimanalal* v. *Vyas Ramchandra* 24 Bom. 367 at p. 377 Stoke's translation 'all having sons may give in adoption one who is not the eldest' is preferred to Mandlik's p.63.

2. This passage corroborates the criticism contained in p. 118*n*.1 of the decision in *Bhimabai* v. *Gurunathgauda* 35 Bom. L. R. 200 (P. C.).

3. For svastivācana and the mātṛs vide above p. 56*n*1 and p. 48. The vṛddhi-s'rāddha is performed when there is an addition to the family or on a joyful occasion (like marriage).

4. This clause is quoted in *Kalgauda* v. *Somappa* 11 Bom. L. R. 797 at p. 812.

5. Madhuparka was an offering of honey and curds made to an ācārya after he is chosen for a rite or to an honoured guest such as a king, son-in-law, father-in-law, maternal or paternal uncle &c.

* P. 121 (text).

at the time of placing fuel-sticks on the fire, and (having made the *saṅkalpa*) 'I shall offer to Agni who is the principal deity in this rite, to Vāyu, the Sun, Prajāpati one oblation each, one oblation again to fire and six oblations of boiled rice to Sūryāsāvitrī, and the rest to (Agni) Sviṣṭakṛt,' he should perform (all the rites) ending with *ājyotpavana*.[1] Then the adopter having gone near the giver should make a request (through the priest) 'give your son', while the giver, after reciting the five *ṛks* 'ye yajñena' (Ṛg. X. 62. 1–5), recalling the time &c. and having repeated the words beginning with 'between me and others' (vide above p. 132) and ending with 'for the creation &c.' should declare 'I make a gift to you of this son who is decked with ornaments according to my ability'. Of the five verses (beginning with the words) 'ye yajñena', Nābhānediṣṭha the son of Mānava, all the gods, Jagatī (are respectively the seer, the deity and the metre) and they are employed in the rite of giving a son. The adopter, having accepted (the boy) with the words 'devasya tvā', having recited the psalm to Kāma[2] as laid down in his own s'ākhā (recension of the Veda), having muttered the *ṛk* 'aṅgād-aṅgāt', having smelt the head of the boy, having decked him with clothes and the like, should take him inside the house to the accompaniment of auspicious music. Then the *ācārya*, having performed the rites beginning with the *ājyasthāpana* and ending with *ājyabhāga*[3], and having offered oblations of clarified butter itself to the accompaniment of the vyāhṛtis separately and together[4], should then offer boiled rice.* 'Yastvā hṛdā' (is the *mantra*), Vasus'rut (is the seer), Agni (is the deity), Triṣṭup (is the metre), its employment is in the homa with boiled rice that is the principal (rite) in the adoption of a son. (After repeating) 'Yas-tvā hṛdā' (Ṛg. V. 4. 10), the offering should be surrendered with the words 'this is for Agni, (it is) not mine' (now). Of (the *mantra*) 'tubhyamagre', Sūryā-sāvitrī, Sūryā-sāvitrī, Anuṣṭup (are respectively the seer, the deity and the metre). 'Tubhyamagre' (Ṛg. X. 85. 38); 'this is for Sūryā-sāvitrī, it is not mine'. Of the five (mantras) 'somo dadat' (Ṛg. X. 85. 41–45) Sūryā-sāvitrī, Sūrya-sāvitrī and Anuṣṭup (are the seer, deity and metre). The employment is as before, 'Somo dadat'. Then he should finish (the *homa* to Agni) Sviṣṭakṛt. This is the (whole) rite (of adoption).

We return to the subject in hand. Kātyāyana states a special rule about the division of debts:

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1. Ājyotpavana consists in purifying clarified butter by passing two kus'a blades through it.

2. Vide Ās'valāyana-s'rauta 5.13 and Āp. s'r. s. 14·11·2 for slightly differing *kāmastutis*.

3. *Ājyabhāgas* are two offerings made to Agni and Soma respectively to the north-east and south-east of the *āhavanīya* fire.

4. The *vyāhṛtis* are the mystic syllables *bhūḥ*, *bhuvaḥ* and *svaḥ*. The offerings will be accompanied with these syllables as follows: 'Oṃ bhūḥ svāhā, oṃ bhuvaḥ svāhā, oṃ svaḥ svāhā, oṃ bhūrbhuvaḥ-svaḥ svāhā.'

* P. 122 (text).

The debt of the father, the debt (incurred) in relation to (i. e. to pay off) the father's debt, one's own debt, and what is incurred by oneself, these debts so incurred should always be cleared (provided for or paid off) on a partition with one's relatives (brothers &c.) [1].

Pitryarṇasambaddham means ' what is incurred for paying off the father's debt '. ***Ātmīyam*** (one's own debt) means ' what is incurred by another for the maintenance and the like of one's family '.

The same author (says):

A debt contracted by a brother, a paternal uncle or mother for the sake of the family, should all be discharged by the cosharers of the (ancestral or joint) estate at the time of partition.

As regards also the debt that is less than the ***riktha*** (ancestral or joint estate), the same author (Kātyāyana) says:

Having paid the debts and what is promised (lit. bestowed) through affection, one should divide the rest [2].

Pradattam means ' promised '. Narada (p. 197 v. 32) says:

*What remains after (providing for) the gifts (promised) by the father and after paying off paternal debts should be divided by the brothers; otherwise the father would remain debtor.

Pitṛdāya (in this verse) means ' what is promised by the father '. The same author (Nārada) says:

*What has been given (or promised) for religious purposes and what is donated through affection by the father and the debt incurred by himself,—these and the visible estate should be divided. There is to be no (other) payment out of the paternal estate (except the above at the time of partition).[3]

The meaning is: whatever is given, that is, whatever is promised to be given for religious purposes and out of affection, whatever (debt) is contracted by the father himself (this is the meaning of ***svena yojitam***), such debts and the visible wealth should be divided; there is to be no payment out of the paternal estate of anything beyond these debts (and obligations). Even when there is a suspicion of some (paternal wealth) being 'not visible (i. e. not brought forward for division), the same author (Nārada) says:

Visible wealth (viz.) houses and fields, quadrupeds (and the like), should be divided. If there is a suspicion of (there being) concealed (joint) wealth, an ordeal is prescribed in such a case. Household utensils, beasts

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1. This verse is quoted in *Ponappa Pillai* v. *Pappuayyangar* 4 Mad. 1. (F.B.) at p. 49.

2. This is quoted in *Ponappa Pillai* v. *Pappuayyangar* 4 Mad. 1 at p. 49.

3. This verse is variously interpreted. Vide notes to V. M. p. 209. Aparārka and Sm. C. explain ' svena yojitam ' as meaning ' debt which the father enjoined his son or sons to pay.'

* P. 123 (text).

of burden, milch cattle, ornaments and slaves, being visible, are divided. Manu has prescribed the ***kos'a*** ordeal as regards concealed (joint wealth)[1].

Karmiṇaḥ means 'slaves and the like'. Hence the very same author (Nārada) has laid down in the section on ordeals the restriction that ***kos'a*** alone is (the ordeal to be employed) as regards this matter :

At all times when confidence has to be secured in case of suspicion (that joint estate might have been concealed) at the time of partition among cosharers and when there are several persons on whom the burden of proof lies (in various ways) ***kos'a*** (ordeal) alone should be administered.

Now (begins the treatment of) impartible property.

Manu (9. 206) says :

* Wealth, however, acquired through learning by a man, becomes his own (exclusive) wealth, and so are gifts from friends, gifts received on marriage or at the time of offering ***madhuparka***.

Vyāsa says :

Whatever is acquired through learning or valour and whatever is ***saudāyika*** (a gift from affectionate kinsmen), these belong (exclusively) to him (who acquires them). They should not be sought for (i. e. claimed) by his co-sharers at the time of partition (of joint estate).

Saudāyika will be explained (later on). And this (wealth) should be understood (as not liable to partition) when it is acquired without detriment to the paternal wealth.

Thus also Yājñavalkya (II. 118--119)[2] says:

1. These verses and the next are ascribed to Kātyāyana in Aparārka, Sm. C. and other works.

2. The verses of Yāj. and the sūtra of S'aṅkha are quoted in *Visalatchi* v. *Annasami* 5 Mad. H. C. R. 150 at p. 157 and the Mayūkha is referred to at p. 159 and it was held that the rule does not extend to property held by a title derived from the joint family and that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a long time. Vide also *Bajaba* v. *Trimbak* 34 Bom. 106 at p. 110 for the text of S'aṅkha. The texts on *vidyādhana* (gains of science or learning) have been discussed in numerous cases of which the following may be referred to ; *Chalakonda Alsani* v. *Chalakonda Ratnachalam* 2 Mad. H. C. R. 56 ; *Bai Mancha* v. *Narotamdas* 6 Bom. H. C. R. p. 1, *Pauliem* v. *Pauliem* L. R. 4 I. A. 109 (=1 Mad. 252), *Krishnaji* v. *Moro* 15 Bom. 32, *Vasantrao* v. *Anandrao* 6 Bom. L.R. 925, *Metharam* v. *Rewachand* 45 I. A. 41 =45 Cal. 666 (which examines most of the previous cases), *Gokalchand* v. *Hukamchand* 48 I. A. 162 (=2 Lahore 40). In *Lakshman* v. *Jamnabai* I. L. R. 6 Bom. 225 it was said at p. 248 'when they (texts) speak of gains of science which has been imparted at the family expense they intend the special branch of science which is the immediate source of the gains and not the elementary education which is the necessary stepping stone to the acquisition of all science.' In 48 I. A. 162 at p. 173 it was said 'From maintenance out of family funds during the period of education the basis of partibility changed to the receipt of the education itself at the family expense and then education generally was narrowed down to specialised education which is now the basis. No corresponding change is however to be traced upon the question what is science in the sense in which the text of the Mitāksharā uses the term.' All doubts and difficulties as to gains of learning being partible or not have been removed by Act XXX of 1930 which makes all gains of learning the self-acquisitions of the acquirer.

* P. 124 (text).

Whatever else is acquired (by a man) without detriment to paternal estate (viz.) gifts from friends and on marriage, that does not belong to the co-sharers. He, who recovers property descending hereditarily but snatched away (from the family), should not give it to (i.e. would not have to share it with) his co-sharers, as also what is acquired through learning.

With regard to land descending hereditarily but recovered (by one co-sharer) S'aṅkha declares a special rule :

If one (co-sharer) recovers land (descending) hereditarily that was at one time lost (to the family), the other (co-sharers) get it according to their respective shares after giving (to the recoverer) a fourth part.

(The meaning is) after giving a fourth part of the recovered land to the recoverer, they should divide the rest (equally) with the recoverer. Manu (9. 208)[1] says:

Whatever a man acquires by his efforts without detriment to paternal wealth, he should not give to his co-sharers nor what is acquired through learning.

Vyāsa says :

* That wealth which a man acquires by his own ability without relying upon (having recourse to) paternal estate, he shall not give to (or share with) his co-heirs nor that wealth which is acquired through learning.

Kātyāyana defines what is meant by ' vidyā-labdha ' (acquired by learning):

That wealth is said to be acquired through learning which is earned by means of learning acquired from another with the use of food (lit. boiled rice) belonging to a stranger.[2]

The same author (Kātyāyana) elucidates this very matter :

What is earned by learning when a matter has been propounded with a stake (before an assembly for discussion) is known to be '*vidyādhana*' (gains of learning); it is not divided (among coparceners) at the time of partition. What is obtained from a pupil, or from being an (officiating) priest, or by (propounding) a question, or by determining a doubtful point, or by exhibiting one's own learning, or by disputation (with an adversary) or by means of eminent study (or learning) is declared to be *vidyādhana* ; it is not divided on a partition. This is the law applicable to artisans also as regards what is (given) in excess (by way of a tip or reward) of the proper price (of an article belonging to a family of artisans). What is acquired by learn-

1. The latter half of Manu 9.208 is different. The text seems to combine a half verse of Manu with another half verse from Yāj. cited above.

2. This verse is quoted in *Durga Dat* v. *Ganesh* 32 All. 305 at p. 312 and it is held that this definition is not exhaustive but only illustrative.

* P. 125 (text).

ing, what is made (i. e. acquired) from a pupil or from one for whom a sacrifice is to be performed are declared to be *vidyādhana*. What is acquired in other ways than these is common property (of all members of the family). Bṛhaspati says 'what is obtained by (superior) learning after vanquishing an adversary in a wager should be known as *vidyādhana* and it is not to be divided'. Bhṛgu says 'what is acquired by (successfully) asserting one's learning, what is obtained from a pupil and what is earned on the analogy of a sacrificial priest (i. e. by making one's knowledge useful to another), (these) are (termed) *vidyādhana*.

Upanyāsa means, according to the Madanaratna, the recitation (of the Vedas) together in ***krama***, ***jaṭā***, and the like modes (of combination)[1]. Some say that it means 'the expounding* of a knotty (abstruse) proposition in an assembly'. The construction is *paṇapūrvakam upanyaste* (when a difficult matter is propounded with a wager). *S'aṁsana* means 'making known (or announcing), *prādhyayana* means 'excessive (or deep) study.' The meaning of the words '*s'ilpiṣvapi*' is that this rule about learning is to be understood as applicable also to artisans; *mūlyādhikam* (beyond the proper price) means 'a reward'; *ṛtviṅ-nyāya* means 'supervising'[2]. Here in all cases there is impartibility only when there is no detriment to paternal estate in acquiring learning and in earning wealth by that learning, but if there is detriment (to paternal estate) then it (the wealth acquired by learning) does become partible. Hence is it that Kātyāyana says:

> Bṛhaspati says that that wealth is to be divided which is (acquired) by brothers that were taught learning in the family or (learnt it) from their father and which is acquired through valour (by such brothers so taught).

Even where there is detriment to the paternal estate, the acquirer does get a double share, since Vasiṣṭha (Dh. S. 17. 51) says 'out of these (brothers &c.) he who by himself acquired it should take a double share'. As regards a certain class of *vidyādhana* Nārada (p. 191 v. 10) mentions a special rule:

> He, who maintains the family of a brother while the latter is engaged in studying, should receive a share out of the *vidyādhana* (of that brother), though he was not promised (to that effect previously).

In the Madanaratna '*as'ruta*' is explained as 'devoid of learning'; but it is proper to explain it as one who was not promised 'I shall give a share'.

1. *Krama*, *jaṭā* and *ghana* are complicated methods of repeating the Vedas, each succeeding one being more complicated than the preceding. Vide notes to V. M. p. 213.

2. Or this may mean 'the word *ṛtviṅ-nyāya* is only illustrative' (i. e. includes similar things).

* P. 126 (text).

As regards (wealth) acquired without detriment to paternal estate Gautama[1] (Dh. S. 28-28) mentions a special rule ' a learned man, if he chooses, may give to (his) learned brothers (a share of) the wealth acquired with his own efforts '. *Vaidya* (a derivative from *vidyā*) means ' one who possesses vidyā (learning) '. The meaning is that he may at his pleasure give (a share of his acquisitions) to his learned brothers. Kātyāyana says :

> ***Vidyādhana*** should in no case be given by a learned man to unlearned (brothers and other coparceners), but it may be given by a learned man to (brothers) who are his equals in learning or superior (to him). A* learned man need not, if he is unwilling, give a share out of his own (self-acquired) wealth to a learned (brother or other coparcener), if he did not acquire it with the help of paternal (i. e. joint family) property.[2]

Madana says ' that this prohibition (contained in the first of the verses above) holds good if the brothers that are living possess other property, ' but that in the absence of other property a share (in gains of learning)should be given to them also.

Bṛhaspati (p. 381 v. 78) declares the impartibility of what is bestowed as a gift by the father and the like:

> Whatever is given by the paternal grandfather and the father and also by the mother, as well as wealth obtained by valour or on the occasion of marriage, belongs to him (to whom it is given); it should not be taken away (at the time of partition).

Nārada (p. 190 v. 6) says:

> Both wealth acquired by valour and that acquired on marriage and gains of learning--these three are impartible, as also the favour (*gift through favour*) bestowed by the father.

Kātyāyana says :

> What is ***dhvajāhṛta*** (snatched from a standard) is never understood to be partible. What is seized in battle after putting to flight the enemy's army or after endangering one's life for the sake of one's master is termed ***dhvajāhṛta***.

The same author says :

> That is wealth gained by valour which is acquired when a master being pleased bestows a reward on a person who does a forceful act after endangering his life.[3]

1. The printed Gautama reads differently. ' A learned man may indeed not give to his unlearned brothers (a share of) the wealth acquired with his own efforts. ' This proposition is implied in the reading adopted in the text.

2. This last verse is Nārada p. 191 v. 11.

3. Kātyāyana makes a distinction between *dhvajāhṛta* and *śauryadhana*; while other writers do not make it.

* P. 127 (text).

On this subject Vyāsa states a special rule;

Brothers are entitled to a share in that wealth which a man acquires by his valour after using some common (i. e. joint family) property such as a horse and the like. But he should be given two shares, while the rest are entitled to share equally.

Vyāsa* describes the nature of saudāyika :

That wealth is known to be saudāyika which is obtained by a married woman or a maiden from her husband or from the father's house (i. e. family) or from her brother or her parents.

Kātyāyana says :

What is obtained at the time of marriage with a maiden of the same caste, that should be known as wealth coming through a maiden. It is declared to be free from taint and productive of prosperity. That should be known as ***vaivāhika*** (due to marriage, nuptial) which comes (to a man) with his wife. All such wealth should be understood to be a means of securing religious merit.

What is acquired in the mode (described in the words) ' the ***āraṣ*** form of marriage occurs on receiving a pair of cows ' (Yāj. I. 59) is ***kanyā. gata*** (wealth coming through a maiden)[1]. Here also there is impartibilite as in the case of gains of learning, if there is no detriment to paternal estaty- But whatever is acquired in a mode distinct from learning and the like is indeed liable to partition. And so Manu (9. 205) says :

But if all of them, not being learned, acquire wealth by their exertions (in agriculture, trade &c.), the division in that case will be equal, it being not (earned with help from) paternal estate; this is the established rule.

Īhā (exertion) means ' work such as agriculture and the like '; ***apitrye*** means ' when no help is received from paternal wealth '. Manu (9. 219) speaks also of other impartible property :

Clothes, vehicles, ornaments, cooked food, water (i. e. wells &c.), women, (wealth set apart for) ***yoga*** and ***kṣema***, ways (or pasture lands)- these are declared to be not liable to partition.

‡ ***Patra*** [2] means ' vehicle '. Clothes, vehicles and ornaments belong to him alone who has worn (or used) them, provided they are of equal value

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1. This meaning of *kanyāgata* given by Nīl. looks somewhat farfetched. His idea is that that wealth, such as a pair of cows &c. which is given to the bride's father in the *ārṣa* form of marriage by the bridegroom's side, constitutes his self-acquired property. If the plain meaning of the words is taken, *kanyāgata* means that wealth which a bridegroom receives just at the time of marriage, while vaivāhika means whatever comes to him with his wife, even after marriage.

2. There is great divergence of opinion about the meaning of *patra* and *yogakṣema*. The former according to Aparārka and others means ' a document or debt evidenced by a document. ' For *yogakṣema* vide notes to V. M. p. 217.

* P. 128 (text). ‡ P. 129 (text).

(with the clothes &c. worn by other coparceners); but if they are of more or less value (than those worn by others), then they must be divided. The clothes and other like things worn (or used) by the father should be given to him who partakes of the s'rāddha (feast) to him (the deceased father), since Bṛhaspati (p. 383 v. 85) says :

> The clothes, ornaments, bed and the like and vehicles and the like, used by the father, should be bestowed on the partaker of the s'rāddha for him (the deceased father), after honouring (the brāhmaṇa) with fragrant ointments and flowers.

Manu (9. 119) mentions a special rule about (the division of) goats and the like, when uneven in number (i. e. when they cannot be equally divided among the coparceners) :

> Goats [1] and sheep, together with beasts having uncloven hoofs (like horses), should not at all be divided, when they happen to be uneven (in relation to the sharers). Goats and sheep, together with uncloven beasts (when uneven and incapable of division into integers) are ordained (to be assigned) to the eldest alone.

Cooked food and water (wells &c.) [2] are to be enjoyed (by all coparceners) according to circumstances. Women i. e. female slaves (dāsīs), when uneven in number, are to be made to work (in turn for the partitioning coparceners) according to need; but if even in number (in relation to the sharers) they are to be divided. The kept mistresses of the father, however, should not be divided, though even in number, since Gautama (Dh. S. 28. 45) says ' there is to be no division as regards women connected' (i. e. kept by the father) [3]. In the *Kalpataru* it is said that by the word *yoga-kṣema* are meant councillors, family priests and the like. Laugākṣi however says :

> Those who know the essence (of *dharma*) say that *kṣema* means *pūrta* (charitable works) and yoga means *iṣṭa* (sacrifices and other religious rites). They both are declared to be impartible, as also beds and seats.

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1. Suppose there are 17, 18 or 19 beasts and four brothers. Each gets four on a division and the remainder (1, 2 or 3 as the case may be) are to be assigned to the eldest. They are not to be valued and their price is not to be distributed among the brothers. This is the meaning according to Medhātithi and others.

2. ' Water ' &c. -- In *Nathubhai* v. *Bai Hansgavri* 36 Bom. 379 at p. 382 this passage about right to wells and water being indivisible is referred to and it is held that if there be no evidence that at a partition they were divided, the law will presume that they continued to retain the character of indivisibility.

3. Haradatta holds that this rule applies not only to the concubines of the deceased father, but also to the concubines kept by any one of the dividing brothers. These words about women and mistresses are quoted in *Naqubai* v. *Monghibai* 50 Bom. 604 (=53 I. A. 153 = 28 Bom. L. R. 1143) at p. 612.

Here *pūrta* means 'tanks, public parks and the like (works of public utility)'; iṣṭa means 'sacrifices, feeding brāhmaṇas and the like (religious acts)'. The meaning is: whatever wealth has been intended to be donated and has been set apart for these (*iṣṭa* and *pūrta*, religious and charitable objects) by any one (co-parcener) with the consent of all (coparceners) in the state of union, that wealth should be used by him alone for that religious object and not by any other (coparcener) nor by all acting in a body. *Pracāra*[1] (in Manu IX. 219) means 'ways leading to the house and the like' and also 'land for the grazing of kine and the like'.

As for S'aṅkha-Likhita[2] 'there is to be no division of a dwelling, or of water-pots, or of ornaments, or of clothes worn (by a coparcener)' and as to Vyāsa

*'The gains[3] of officiating at a sacrifice, a field, a vehicle, cooked food, water and women-these are not to be divided among kinsmen even up to a thousand generations'.

who (S'aṅkha-Likhita and Vyāsa) declare that dwellings and fields are impartible, these texts are applicable to dwellings (like temples) used for religious purposes, and to land that is used as pasture for kine; or these texts purport to forbid the partition of these (dwellings and fields), when acquired by way of a gift, among the (sons of a brāhmaṇa born of a wife of the) *kṣatriya* or other lower caste since there are prohibitory texts (on this point) as noticed above: or they (texts of S'aṅkha-Likhita and Vyāsa) mean that when these (dwellings and fields) are of small value they should not be divided in kind (i. e. by metes and bounds) but there should be a division of their price.

Bṛhaspati (p. 382 vv. 79-84) mentions special rules about (the division of) clothes and the like:

Those[4] who declared that clothes and the like are not liable to partition have not thought (over the matter properly). (For) the wealth of the rich may (all) be centred in clothes and ornaments. If they be

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1. Nīlakaṇṭha gives two meanings of *pracāra*. The Mit., Aparārka and Vir. give the first meaning, while the Smṛticandrikā and Kullūka give the second. This explanation of *pracāra* is referred to in *Shantaram* v. *Waman* 47 Bom. 389 at p. 396.

2. This sūtra of S'aṅkha-Likhita is variously read. Vide notes to V. M. p. 278. 'No division of a dwelling'—Vide Partition Act (IV. of 1893) sections 2 and 4 and *Vaman* v. *Vasudev* 23 Bom. 73 and *Balshet* v. *Miransaheb* 23 Bom. 77.

3. The word *yājya* thus translated is explained by the Dāyabhāga as meaning 'the site of a sacrifice' or 'an idol.'

Nīlakaṇṭha offers three explanations of these texts, the second of which is the same as that of the Mit. The prohibitory texts about the sons of a brāhmaṇa from a kṣatriya wife occur on text p. 103 (tr. p. 97).

4. Bṛhaspati holds Manu in the highest veneration, as he says elsewhere 'that smṛti which is opposed to the drift of Manu is not commended;' but here he criticizes Manu (9. 219).

* P. 130 (text)

kept joint (or undivided), they cannot be (properly) enjoyed, nor can they be given (allotted) to one alone (out of many cosharers). They should (therefore) be divided with skill, otherwise they will become useless. Clothes and ornaments are divided by selling them (i. e. by dividing the proceeds of sale), debts consigned to writing (are divided) after they are recovered (i. e. the bond itself is not divided), cooked (or prepared) food (is divided) by exchanging it for uncooked food. The water of wells[1] which have flights of steps and of other wells is to be enjoyed according to one's respective share, after drawing it out; a single female slave is to be made to work in the respective houses (of the cosharers) according to their shares; if they (female slaves) be many, they are to be allotted in equal shares (to the sharers). This (very) rule applies also to male slaves. Fields and embankments are to be divided according to the respective shares (of the co-sharers). Ways (or pasture lands) should always be used by the co-sharers (after partition) according to their shares.

**Udgrāhya* means ' after recovering (the debt) from the debtor '. Kātyāyana says:

Wealth[2] which is consigned (mentioned in) a deed and is designed (assigned) for religious (and charitable) purposes, water (i. e. wells &c.), slaves, a *nibandha* that descends hereditarily, worn clothes, ornaments and whatever is unfit (for division)—these should be applied (enjoyed) by the members (of the family) according as they were enjoyed in times (before separation of the members)

The (clause) *dhanam*[3] &c. means ' written down in a document after resolving to set it apart for a religious (or charitable) purpose ' : *udakam* (water) i. e. water contained in a well and the like; *nibandha* means 'vṛtti' (i.e. hereditary right to officiate as priest or to receive cash or other income); *nānurūpam* means 'unfit for division'.

Yājñavalkya (II. 126) declares partition of property kept concealed (by one member) from his brothers and the rest:

Property that is concealed from each other (by co-sharers) and

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1. Vide *Govind* v. *Trimbak* 36 Bom. 275 (= 12 Bom. L. R. 363) at p. 277 where it was said that rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal and after partition these must be enjoyed by the separated coparceners by turns.

2. These words ' yathā kālopayuktāni &c. ' may also mean ' should be so enjoyed as to be useful (to all cosharers) on the occasions (when their use is needed). ' These words of Kātyāyana that any portion once assigned for purposes of religion shall be excepted from partition are referred to in *Khushalchand* v. *Mahadevgiri* (1875) P. J. p. 276. Vide also 30 Mad. 340 at p. 344.

3. Mit. takes the first half of Kātyāyana's verse ' dhanam &c. ' as one clause. The Madanapārijāta and other works take the first half verse as containing two clauses, viz. debt evidenced by a deed (as long as not recovered) and what is set apart for religious purposes.

* P. 131 (text).

that is discovered after partition should be divided by them again in equal shares; this is the settled rule.

Anyonyapāhṛtam means 'concealed by the eldest from the youngest and the like' (i. e. ***vice versa***). As to the text of Manu (9. 213).

He, who, being the eldest, would defraud his younger brothers through greed, shall lose his position as eldest, shall be deprived of his share and shall be punished by the king[1]

there also the word *jyeṣṭha* implies (i. e. it is merely illustrative and includes) every sharer in the heritage on the analogy of the maxim of the staff and the cakes, the meaning being 'even the eldest incurs blame (when he defrauds), what of younger brothers' (i. e. they will be much more blamable). Hence Gautama[2] says: 'him who keeps a sharer off from his share, he (the defrauded sharer) destroys; if he* does not destroy him (the defrauding sharer), he destroys his son or grandson.' ***Bhāginam*** means 'him who is entitled to a share'; ***bhāgāt nudate*** means 'deprives of a share'. That man who is so deprived destroys (*cayate*) him (***enam***) i. e. him who so deprives (or usurps). If he does not destroy him, then he destroys his son or grandson. This is the meaning.

Nārada[3] says:

The wealth acquired by a separated man belongs to him alone; but as to what is found after being stolen or lost and the property mentioned before, there shall again be a division.

Prāg-uktam refers to property concealed by some one from among the

1. i. e. he will not be honoured as eldest and, according to Kullūka, will lose his regular and special (*uddhāra*) share.

Mandlik's explanation of this maxim (p. 72*n* 5) is entirely wrong. He says that in Southern India cakes are carried after being tied to a stick and 'when a cake is asked for, the servant brings the stick, whereby he leaves it to the master to choose any he likes (p. 72n. 5).' *Apūpas* are preparations of flour and ghee. If they were placed on a stick and if any one were to say 'that the stick was gnawed by a mouse', one would infer as a matter of course from this announcement that the temptingly flavoury (and very soft as compared with the stick) apūpas placed on the stick must have been devoured by the mouse. This maxim is very frequently cited in works on rhetoric. The Mit. employs it in its comment on Yāj. II. 126. Vide notes to V. M. pp. 221--22.

2. Nīl. follows the Mit. in ascribing this quotation to Gautama. It is however not found in the printed Gautama. It is from the Aitareya-brāhmaṇa (II. 1. 7) and the Parās'ara mādhavīya and the Vīr. correctly call it a s'ruti. Vide *Krishnabai* v. *Khangowda* 18 Bom. 197 (where it was held that a partition effected without reserving any share for a minor member of the family and without the consent of some one authorized to act on his behalf is invalid as against the minor).

3. This is not found in the printed Nārada and the Smṛticandrikā ascribes it to Kātyāyana and connects it with another verse of Kātyāyana. 'Whatever property is concealed from each other and what is inequitably divided should be again divided equally when afterwards found out, according to Bhṛgu'. Vide *Maruti* v. *Rama* 21 Bom. 333 and *Ganeshi Lal* v. *Babu Lal*, 40 All. 374 as to reopening of partition.

* P. 132 (text).

co-sharers. The word ***vibhāgaḥ***(division)has to be understood after the words ***punar-bhavet*** ' (there will again be). Manu[1] says :

When, after a partition is made, some joint property is discovered, that partition should not be regarded (as proper), but a fresh division should be made.

In case of the denial of partition by any one (of the separating co-parceners), Yājñavalkya (II·49) mentions decisive circumstances :

On denial of partition, it should be understood that the (fact of) partition is to be established by (testimony of) agnatic kinsmen, cognatic relations, witnesses, by documents and by (the evidence of) houses and fields being separately held.

'Yautakaiḥ' means ' separately alloted ' and there is the relation of ***vis'eṣaṇa*** (attribute) and ***vis'eṣya*** (thing possessing an attribute) between that word and ***gṛhakṣetraiḥ*** (houses and fields). Nārada (p. 198 v. 36) says :

In case of doubt with regard to the status of division between co-sharers, the determination (of the dispute follows) from (the testimony of) kinsmen, a document of division and from the separate transaction of business (such[2] as agriculture &c.).

The same author (Nārada p. 198 v. 37) says :

The religious duty of unseparated persons, brothers (and the like), is single; when there is partition, their ***dharma*** (religious rites and duties) also comes to be separate.

In this (verse), the word ***avibhaktānām***[3] (of unseparated persons) alone yields the ***uddes'ya*** (the subject), while the word ***bhrātṛṇāma***, being its attribute is not intended (to be taken literally, but only indicatively). Therefore even as regards the father, the grandfather, the son, the grandson, paternal uncle, brother and brother's son, when they are unseparated,* the ***dharma*** (the performance of religious rites and duties) is only single (and not separate for each member).

Though a single performance (***tantra***) of an act having reference to several religious acts is possible, according to the reasoned conclusion

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1. This is not found in the printed Manu.

2. This word ' pṛthak-kārya-pravartanāt ' may also mean ' from the separate performance of religious duties, such as Vais'vadeva, honouring guests &c. '

3. Vide above (text p. 46 tr. p. 42*n*. 2) about the Mīmāṁsā rule that the *viśeṣaṇa* (attribute) of a subject in a rule is not to be taken literally but only indicatively (as in ' he cleanses the cup) '. If *bhrātṝṇām* were regarded as the subject about which it is laid down or predicated that there is to be a single dharma for them (and not separately for each) when they are undivided, the result would be that as regards other undivided coparceners (like uncle and nephews, father and sons) the *dharma* is not one, but separate. But this is not so. Therefore the subject is *avibhaktānām* and the rule applies to all undivided members whatever and the word *bhrātṝṇām* is only illustrative. This verse of Nārada is quoted in *Debi Prasad* v. *Thakur al* 1 All. 105 (F.B.) at p. 109.

* P. 133 (text)

(*nyāya*, of the Purvamimāṁsā), only when the place, the time and the agents (in all of them) are the same, yet in this verse (Nārada 16. 37) the same (a single performance of *dharma*) is inculcated by express words even when the agents are different but undivided[1]. Hence the religious duties of undivided persons that are to be performed with *s'rauta* and *smārta* fires are to be performed separately (for each member), since the *āhavanīya* (s'rauta fire) and the *āvasathya* (gṛhya or domestic fire) are different (in the case of all), being connected (with each individual kindler thereof). Similarly the *s'rāddha*[2] to be performed by the paternal uncle, the brother's son and the rest on the *amāvāsyā* (new moon) and other days is separate as the *devatās* (of the s'rāddha in each case) are different. But in the case of brothers who have not kindled the fires, (*s'rāddha* is to be performed) by a single performance (for all brothers) as the *devatās* (in the s'rāddha by brothers) are the same.[3] Still when the places (where the brothers reside) are different owing to (one or more) going on a travel abroad and the like, (the brothers must perform s'rāddha) separately. In the case of those who have consecrated the sacred (*s'rauta and smārta*) fires, those religious acts that are to be performed with the (sacred) fires are to be performed separately (though the family is undivided), while the worship of the family deities (idols), the *vais'vadeva* (daily offerings to all the gods)

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1. *Tantra* means ' *yugapad-bhāva* ' or ' anekoddes'ena sakṛd-anuṣṭhānam ' and means doing an act once which serves the purpose of many. According to the Pūrvamīmāṁsā XI. 1. 53-55 and XI. 2. 1 one single performance of the *prayājas* is sufficient for the several principal rites of the dars'apaurṇamāsa sacrifice, the place, the time and the agent being the same. So it may be argued that, as the several members of a joint family are different, the religious rites must all be different, one of the three conditions of *tantra* (viz. sameness of agent) being wanting. Nīlakaṇṭha replies that though this is the doctrine of the Mīmāṁsā yet here there is an express text of Nārada laying down a single performance of *dharma*, though the members are many i. e. this text expressly carries the rule about single performance beyond what is laid down in the Mīmāṁsā.

2. Nīlakaṇṭha abruptly introduces some rules here about the performance of religious acts by undivided persons. The text of Nārada introduces a sweeping general rule to which Nīl. specifies exceptions. The *s'rauta* fires are the *Āhavanīya* · *Gārhapatya* and *Dakṣiṇāgni*, which are required in the Dars'apurṇamāsa, cāturmāsya and other vedic rites. All offerings in s'rauta, (Vedic) rites are made in the Āhavanīya. The five great daily yajñas, the pārvaṇa s'rāddha and certain other rites laid down in the gṛhya sūtras are performed with the domestic fire. The fire consecrated by A is not the same as the fire consecrated by B i. e. the fires being related to the persons kindling them and so being different, the rites to be performed with them must be separately performed.

The paternal uncle of a person would offer piṇḍas to his three paternal ancestors while the nephew would offer piṇḍas to his own three ancestors ; i. e. the *devatās* in the s'rāddha offered by each will be different (though one or two may be common, as the father and grandfather of the uncle will be the grandfather and great-grandfather of the nephew).

3. All brothers have to offer *piṇḍas* to the same three paternal ancestors (i. e. the *devatās* in the s'rāddha are the same). But if a brother goes abroad, he performs s'rāddha separately, as the place is not the same, though *devatās* and time are the same.

and the like (are to effected) by a single performance (for the whole family[1]). Hence S'ākala says:

> For those who reside (together) and cook their food together, the worship of the idols in the house and the vais'vadeva also are single, but in the case of those who are divided, (these are performed) in each house (separately).

As to what Ās'valāyana (as quoted) in the Pārijāta says:

> Of those who reside and cook their food together, though divided, the chief (i. e. the manager or head) alone should perform the four ***yajñas*** (daily sacrifices) which are preceded by ***vāgyajña*** (study and teaching of the Vedas). Men of the regenerate classes separated and unseparated, who cook their food separately, should every day separately perform before their meals the (five) ***yajñas***[2].

it refers to those who are reunited, since the clause ***vibhaktānām api ekapākena vasatām*** (who, even though divided, reside and cook their food together) and the words ***vibhaktāḥ avibhaktās'ca*** (first separated and then joined together) convey that fact[3]. Therefore in case re-united members cook their food separately the (five daily) ***mahāyajñas*** are to be performed separately. ***Vāgyajña*** (in the above verses) means '***brahmayajña***'. '***Tatpūrvakān***'[4] (preceded by it i. e. by ***brahmayajña***)

1. It is to be noticed that Kamalākara, a first cousin of Nīlakaṇṭha, lays down somewhat different rules on the points touched upon by Nīl. Vide notes to V. M. p. 226. For *Vaiśvadeva vide* Manu III. 84-86.

2. The five daily yajñas to be performed by every twice-born householder are mentioned by Manu III, 70; they are *Brahmayajña, Pitṛyajña, Devayajña, Bhūtayajña* and *Nṛyajña*. *Brahmayajña* means 'study and teaching of Vedas'. Brahmayajña is enumerated as the first of the *yajñas* in Manu and elsewhere.

3. Nīlakaṇṭha seems to take the words 'avibhaktā vibhaktās'ca' in the reverse order, as meaning 'first separated and then joined' i. e. reunited after separation. But this is somewhat farfetched. According to him the two verses lay down two propositions about reunited persons. If they cook their food together in one place, the manager or head alone should perform the five yajñas; if even after reunion they continue to cook separately they should perform the *yajñas* separately.

4. In a *bahuvrīhi* compound two words are so related that they together refer to a third word, of which they together become the attribute. Bahuvrīhi compounds are of two kinds. When we say 'citragum ānaya' (bring the man who owns variegated cows), it is the man who is brought and not the cows; that is, the bahuvrīhi compound chitragu (containing two words *citra* and *gau*) refers to an individual who is himself apart from the import of the two words *chitra* and *gau*. Therefore such *bahuvrīhi* compounds are called *atadguṇasaṁvijñāna* (i. e. in which there is no direct contact or there is no inherence of the things denoted by the two words of the compound in the individual that is indicated by the compound). But if we say *citravāsasam ānaya* (bring the man who wears variegated clothes) the man who is brought comes along with the variegated clothes i. e. here the individual indicated by the two words forming the *bahuvrīhi* compound is not apart from what is the import of those two words, but he is in direct contact with the clothes he wears. Such compounds are called *tadguṇasaṁvijñāna* (in which there is direct contact or inherence of the things denoted by the two words constituting the *bahuvrīhi* with the thing indicated by the compound). The word *vāgyajñapūrvakān* (of which vāgyajña is the first) is a *bahuvrīhi* and

is *atadguṇasaṁvijñāna* (kind of *bahuvrīhi*). If it* were taken as *tadguṇasaṁvijñāna* the word 'vāg-yajña-' would be superfluous, since the (first) four (*yajñas*) would follow as a matter of course on account of the maxim 'there being no reason for omitting the first (in an enumeration of several items)'. Therefore brahmayajña (the daily sacrifice of repeating Vedic texts) should be performed separately (by united or re-united members). But these two texts are not much respected (relied on) by the learned.

As for the texts (quoted) in the Dharma-pravṛtti[1]:

> Undivided sons should perform a single *s'rāddha* on the anniversary of the death of their parents; if in different countries, they should perform the Dars'as'rāddha and the monthly s'rāddhas separately (as also the s'rāddha on the anniversary of death). If the undivided (brothers) go to (reside in) different villages, they should always perform the *dars'a* and monthly s'rāddhas of their parents separately. The brothers, who being unseparated, reside in different villages and subsist on wealth acquired by each separately, should perform the (*ekoddiṣṭa*) *s'rāddha* and the *pārvaṇa s'rāddha* (of their parents) separately

And as to what is (said) in the Smṛtisamuccaya

> Vais'vadeva, (the s'rāddha on) the day of death (i.e. on the anniversary of a person's death), the Mahālaya[2] (s'rāddha) rite, as also *dars'as'rāddha* should be performed separately when (the sons) reside in different districts.

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qualifies the word *yajñān*. If it were taken as a *tadguṇasaṁvijñāna*, the result would be that *vāgyajña* would be included in the words *caturo yajñān* (as clothes also come along with the man when we say *citravāsasam ānaya*). That verse says 'one alone may perform the four sacrifices' &c. In all five *yajñas* are enumerated in Manu and others. If one says 'four yajñas should be performed,' then naturally the first four (of which vāgyajña is the first) in the list of five will ordinarily be understood, no special reason being mentioned why the first should be omitted. That being the case the word 'vāgyajñapūrvakān' becomes superfluous, the words caturo yajñān being sufficient to convey the sense intended. Therefore vāgyajñapūrvakān should be taken as *atadguṇasaṁvijñāna*). In that case the meaning would be 'one alone should perform the four yajñas preceded by vagyajña' (i.e. all yajñas except vāgyajña, just as cows do not come along when we bring *citragu*). This interpretation leads to a reasonable view, viz. it leaves liberty to all members of a joint or reunited family to engage in vagyajña separately and only the head is to perform the other four yajñas. The Veda calls upon all, whether joint or not, to study the Veda. If only one member were to perform vagyajña (as would be the meaning with *tatguṇasaṁvijñāna*) this vedic injunction would be set at naught. Nīl. relies on Jaimini. X. 5. 1--6 for the proposition that in the absence of a special reason, the first items in a series are to be taken (and not the last &c.). Vide notes to V. M. pp. 227--229.

1. This is a work on *ācāra*, *saṁskāra*, *dāna* and *śrāddha* by Nārāyaṇa, who seems to be different from Nārāyaṇabhaṭṭa, the grandfather of Nīl. The author flourished between 1400 and 1600 A. D.

2. Mahālaya s'rāddhas were prescribed to be performed in the dark half of Bhādrapada from the first *tithi* to amāvāsyā. or from the 5th, 6th, 10th or 11th *tithi* to amāvāsyā, or at least on one day in that fortnight. Vide notes to V. M. p. 230,

* P. 134 (text).

these also, according to some, are applicable to re-united (coparceners) residing in different districts. But these texts are, in reality, without authority. Or the texts might have been composed by some one based on reasoning such as the following: When the place, the time and the agents are the same a single performance (of religious rites) follows from the reasoned conclusion (of the *mīmāṁsā*); while a single performance even when the agents are different may be ordained (as above by Nārada) in express words, but in case the districts are different, s'rāddhas and the like are to be performed separately (even by undivided members) as there is (on this point) absence of a reasoned mīmāṁsā conclusion and of an express text. This is (in brief) the idea.

Nārada (p. 199 vv. 38--40) mentions other signs also of division:

> It is (only) divided brothers and not undivided ones that can become in respect of each other witnesses or sureties or can give a debt or take back a debt (from each other). *Receiving and paying back a debt, the acceptance of beasts (kine &c.), of food, of houses and fields, must be regarded as separate in the case of those who are divided, as also documents, income (by way of interest) and expenditure. People should regard them to be divided, even though there be no writing, in whose case these transactions are entered into openly with their co-heirs.

Dāna (giving) and *grahaṇa* (taking back) have reference (in the first verse) to debts; the same *dāna* and *grahaṇa* are repeated in the second verse for the sake of clearness. The meaning is: the acceptance (by way of a gift) of beasts and the rest produces (separate) ownership in the case of divided members when it is effected by each separately; while in the case of undivided members, it (acceptance) when effected by one member produces ownership even in the others. (The word) *dāna-dharma*[1] means ' a deed and the like '; *āgama* means ' addition of interest (*kalā*) to the principal '. Bṛhaspati (384 v. 92) says:

> Those who have their income, expenditure and mortgage dealings separate and who enter with each other into transactions of money lending and trade, are beyond doubt divided.

Vaṇikpatham means the 'business of a trader'. Yājñyavalkya (II-52) says:

> Among brothers, between husband and wife and between father and son, the relationship of being a surety, or of debtor and creditor, or of being witnesses has not been declared (in the texts) when they are undivided.

In the absence of these *indicia* (of division), ordeals (are to be resorted to), since the same author (Yāj.II.22) has declared:

> In the absence of (any one of) these (human means of proof), one out of the divine (means of proof, ordeals &c.) is ordained.

1. This word may mean ' gifts and other religious or charitable acts '.

* P. 135 (text).

As regards what Vṛddha-Yājñavalkya says:

In case of a doubt regarding the status of separation, the establishment of it is to be made by means of (the testimony of) kinsmen, witnesses and by means of documents; there is no divine proof (in this matter)

that has reference to cases where there exist other signs (of separation). If the doubt as to whether (certain persons) are divided or undivided cannot be removed by any means, Manu declares that a fresh partition should be made:

When* there is a doubt as to whether coheirs are separate among themselves, a fresh partition should be made (by them), even though they might be residing in separate places.

Nārada (pp.199--200 vv. 42-43) mentions the duties of separated (coparceners):

Where many persons sprung from one (person or family) perform their *dharmas* (religious duties) and worldly transactions separately and are separately possessed of means (such as household utensils) for performing various acts and do not consult (each other) in their transactions, if they of their own accord make a gift or sell, they may do all that as they please; for they are masters of their own wealth.

Dharmāḥ are the five (daily) mahāyajñas and the rest that are prescribed by injunctive texts; *kriyāḥ* means worldly acts such as trade and the like; *karmaguṇāḥ* are means of (performing) acts such as household utensils; by separateness in these partition is indicated. The meaning is that those who are separated may make a gift, sale or the like even without each other's consent. As to what Bṛhaspati (p. 384 v. 93) says:

Coheirs, whether divided or undivided, are alike in respect of immoveable property, since one (coheir among many) is not master in all cases to make a gift, mortgage or sale.

that text, according to Madana, is meant to negative the right to give away (or sell &c) without the consent (of other coheirs), the crops and the like produced in fields that are left undivided, even though the coheirs may be divided as regards the moveable portion (of the joint family property); while that text, according to Vijñānesvara and others, is meant to facilitate transactions with the consent of divided coparceners in order that doubts as to whether (coheirs) are divided or undivided may be dispelled.[1] The same author (Bṛhaspati p. 384 v. 95) says about one who having first separated at his own desire raises a dispute (about the fact of his separation):

He,¶ who, having separated by his own wish, again disputes (the fact of separation), should be made by the king to abide by his share (already allotted) and should be punished, since he is guilty of (vexatious) obstinacy. Anubandhaḥ means 'obstinacy.'

1. Nīlakaṇṭha seems to favour the latter view.
* P. 136 (text). ¶ P. 137 (text).

Now (begins) the order of taking (i. e. succeeding to) sapratibandha dāya (obstructed heritage).

On this point Yājñavalkya (II. 135-136) declares the order of succession to the wealth of one who (died) separated[1] and not re-united :

The wife, the daughters also, the parents, the brothers, their sons, *gotrajas* (agnatic kinsmen), *bandhu* (a cognate), a pupil, a fellow-student—of these, on failure of (each) preceding, the next following is entitled to take the wealth of one who has gone to heaven (i. e. who is dead) and leaves no male issue. This rule applies to all the varṇas (the four principal castes).[2]

The wife, if faithful to her husband, takes (her desceased husband's) wealth, but not if she is unfaithful, since Kātyāyana says :

The wife, who is faithful (to her husband), is entitled to take the wealth of her (deceased) husband

and since Hārita (Laghu Hārita 67) says:

If a woman [3], becoming a widow when young, is head-strong, maintenance (and not the estate of her husband) should then be given to her for the passing (i. e. for the support) of her life.

Prajāpati says :

A chaste woman, if she die (before her husband), takes away his *agnihotra*[4] and her husband's estate, if the husband die (before her). This is the ancient rule.

Agnihotram means 'the consecrated fires'. The same author (Prajāpati) says :

Having taken all his (husband's) moveables and immoveables, (such as) inferior metals, gold, liquids (oil, ghee &c.), clothes, she should cause his

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1. In *Ramappa* v. *Sithammal* 2 Mad. 182 (F. B.) a divided son was preferred as an heir to the widow of the deceased; vide p. 185 for reference to V. M.

2. These verses of Yāj. are translated in many cases. Vide *Lallubhai* v. *Mankorebai* 2 Bom. 388 at p. 416 and 20 Mad. 207 at p. 218.

3. The word *karkaśā* is explained by the Mit. as 'suspected of incontinence'. It probably means 'when she leads a wild dissolute life' and not the restrained and dignified life enjoined upon widows in ancient works. In *Valu* v. *Ganga* 7 Bom. 84 this passage of Hārīta is referred to (at p. 88) and it is said 'It is plain that the authors of the Mit. and the Mayūkha regarded the above text of Hārīta as exclusively intended to qualify the right of the widow to inherit her husband's property' and a doubt is expressed whether the text applies to maintenance. In *Gangadhar* v. *Yellu* 36 Bom. 138 it was held that a widow was not disqualified from inheriting the property of her husband on the ground of her unchastity during her husband's lifetime, if it is condoned by him. This last was followed in *Radhe Lal* v. *Bhawani Ram* 40 All. 178. Vide as to effect of unchastity on a widow's right of maintenance, *Kisanji* v. *Lakshmi* 33 Bom. L. R. 510 where most of the cases on the subject are collected and where it was held that unchastity would disentitle a widow from recovering maintenance, even if it be claimable under an agreement.

4. i. e. she was cremated with the sacred fires kindled by him. Compare Yāj. I, 49 and the Mit. thereon.

monthly, six-monthly and yealy s'rāddhas to be performed [1]. She* should honour with oblations and *pūrta* (charitable gifts) her husband's paternal uncle, preceptor, daughter's son, sister's son, maternal uncle, and also old persons, guests and women (either born in the husband's family or dependent on him).

Kupyam means 'tin, lead and the like' (base metals). As to what Bṛhaspati (p. 378 vv. 53-54) says:

> Whatever property of various kinds such as pledges and the like that belongs to a person after partition, his wife, on his death, shall get it with the exception of immoveables. The wife, even if virtuous and even if a share were alloted (i. e. even if her husband was alloted a share on a partition), is not entitled to immoveable property

that, according to Smṛticandrikā, refers to a wife having no daughter (even), since a wife who has a daughter takes even immoveable property; while, according to Mādhava, that text is meant to forbid the sale &c. of immoveable property (by a widow) without the consent of (her husband's) kinsmen.[2]

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1. The *ābdika* s'rāddha is the one performed on the anniversary of the day of death. The monthly *śrāddhas* are twelve, performed every month on the day of death and the six monthly s'rāddhas are two. Aparārka, Dāyabhāga and some others read 'ṣāṇmāsādikam' and explain that a widow could not perform the *pārvaṇa* s'rāddha and so that text specifies the monthly and six-monthly *śrāddhas*. The word ādi refers to the s'rāddha on the 11 th day after death, the sapiṇḍīkaraṇa &c. This verse is referred to in *Lallubhai* v. *Mankorbai* 2 Bom. 388 at p. 420 and in *Sundarji* v. *Dahibai* 29 Bom. 316 at p. 319.

2. This view of Mādhava is more reasonable and has been universally accepted by the British Indian Courts, which hold that a widow cannot alienate her husband's immoveable property except for legal necessity or without the consent of those who are her husband's presumptive heirs after her death. As regards movables a widow succeeding as heir has larger powers of disposition during her lifetime than over immoveable property (vide *Damodar* v. *Purmanandas* 7 Bom. 155 at p. 163) but she cannot dispose of them by will (*Sha Chimanlal* v. *Doshi* 28 Bom. 453); *Gadadhar Bhat* v. *Chandrabhagabai* 17 Bom. 690 (F. B.), where on p. 710 reference is made to the passages of the Mayūkha about the wife. In *Gurunath* v. *Krishnaji* 4 Bom. 462 it was held that even if the husband was separate and died sonless, his widow in the absence of special circumstances would have no power to make an absolute alienation of the husband's estate. The consent of the reversionary heirs may validate an alienation by a Hindu widow, since it offers presumptive evidence of the justifiability of the alienation, but in the earlier cases like *Varjivan* v. *Ghelji* 5 Bom. 563 at p. 571 the consent of a female reversionary heir like the daughter was thought to be insufficient. However in later cases it has been held that it does not matter whether the consenting reversioner is a male or a female; vide *Akkava* v. *Sayadkhan* 51 Bom. 475 F. B. (=29 Bom. L. R. 386). In the case of a gift by a widow consented to by a reversioner it has been held that it would be binding on the reversioner on the principle of election to hold the alienation good. Vide *Basappa* v. *Fakirappa* 46 Bom. 202, *Rangasami* v. *Nachiappa* 45 I. A. 72. The text of Kātyāyana 'when the husband is dead' is quoted in *Narasimha* v. *Venkatadri* 8 Mad. 290 at p. 292 and it was held that restriction on the widow's power applies to both movables and immovables. This text is

*P. 138 (text).

that text refers, according to Madana, to the wives of one who dies undivided or re-united, since it occurs when it (re-union) is the topic of discussion. Kātyāyana says :

If the husband is gone to heaven (i. e. is dead), his *strī* is entitled to food and raiment ; she obtains, when he dies undivided, his share of the wealth till her death [1].

The word *avibhakta* (undivided) is illustrative (and so inclusive) of the re-united also ; the word 'tu' (but) is used in the sense of 'or'. Therefore there are two propositions (in this verse), out of which the latter refers to the wife and the former to kept women; this is the view of Madana. The basis (the reason) of this statement (of the law) requires consideration (i. e. this statement of the law is not quite correct). The same author (Kātyāyana), however, makes a correct statement (of the law):

*(the wife) being engrossed in serving the elders, is entitled to enjoy the share assigned ; but if she does not serve (the elders), only food and raiment should be provided for her.

Guru means 'father-in-law and the rest' (the other elders). The meaning is that (the widow of a deceased member in a joint family) takes a share at the pleasure of the *gurus* (elders), but otherwise only food and raiment. The same author (Kātyāyana) says :

(a widow) [2] who does acts injurious (to the family), who is immodest, who destroys the wealth (of the husband) and who is addicted to unchastity, is not entitled to the wealth.

As for the text (Manu 11. 188):

this same[3] procedure should be followed also in the case of fallen women; food and raiment should be given to them and they should reside near the house

it, according to respectable writers, refers to the husband (when he is living). *Evam vidhim* means '(the procedure) viz. deserting the fallen (degraded)'.

Even to a widow who is suspected of incontinence, only maintenance (is to be given) since Hārīta says ;

If a woman becoming a widow (vide above p. 150). *Karkaśā* (as said) in the Mitākṣarā means 'suspected of incontinence'.

1. This verse is quoted in *Lakshman* v. *Satyabhamabai* 2 Bom 494 at p. 511 and in *Savitribai* v. *Laxmibai* 2 Bom. 573 (F. B.) at p. 582.

2. This verse is quoted in *Musammat Ganga* v. *Ghasita* 1 All. 46 (F. B.) at p. 48.

3. This verse is quoted in *Bhikubai* v. *Hariba* 49 Bom. 459 at p. 468. Manu in the preceding verses (11. 182 and 184) laid down that kinsmen should treat a man guilty of a *mahāpātaka* as dead, should offer water to him as they do to a dead man, should stop all intercourse with him (viz. speaking, inviting, sittting in his company) and should not give him the heritage.

* P. 140 (text).

Therefore[1] it is established (by the foregoing discussion) that a lawfully wedded wife, who restrains (her senses), is entitled to take (her deceased husband's) property. But if there be more than one they will take it after dividing (equally among themselves).

In default of her (i. e. of the widow), the daughter[2] (takes the estate of the deceased). Hence Manu (IX. 130) says:

> *A son (of a man) is like the man himself and the daughter is equal to the son. How can another inherit the estate (of a deceased person) when she (the daughter), who is his self (as it were), is living ?

If there be more daughters than one, they should divide and take the estate. Among them also, if one is married and the other is unmarried, then only the unmarried one (takes the estate), by reason of the words of Kātyāyana :

> A wife who is chaste takes the wealth of her husband ; in default of her, the daughter (takes) if she be unmarried.

Among married (daughters), if one is rich and the other is indigent, then only the indigent daughter gets (the estate), on account of the dictum of Gautama (Dh. S. 28. 22) '***strīdhana*** (woman's peculiar property) goes to the daughters, unmarried and unprovided[3] for '. ***Apratiṣṭhita*** means 'devoid of wealth '. Those who are well-versed in the tradition (of law)[4]

1. This paragraph is quoted in *Hari* v. *Vitai* 31 Bom. 560 at p. 564.

2. The whole section about the daughter is quoted in 46 All 192 at p. 196. ' Daughter ' means ' legitimate daughter '. Vide *Meenakshi* v. *Muniandi* 38 Mad. 144. In *Advyappa* v. *Rudrava* 4 Bom. 104, it was held that a daughter was not debarred from inheriting to her father by reason of unchastity. At p. 111 reference was made to the entire silence of the Mit. and the Mayūkha about the chastity of daughters when both are very particular about chastity in widows and at p. 114 the passages of Manu and Kātyāyana and Mayūkha's remarks thereon are quoted. This case was approved of in *Tara* v. *Krishna* 31 Bom. 495 and followed in *Kojiyadu* v. *Lakshmi* 5 Mad. 149. Several daughters succeed as tenants-in-common and in Bombay take absolute estates which they can dispose of even by will. Vide *Babaji* v. *Balaji* 5 Bom. 660, *Bulakhidas* v. *Keshavlal* 6 Bom. 85 (where the verse of Manu and the words ' If there be more .... take the estate ' are quoted), *Bhagirathibai* v. *Kahnujirao* 11 Bom. 285 (F.B.), *Vithappa* v. *Savitri* 34 Bom. 510 (=12 Bom. L. R. 487), *Balvantrao* v. *Bajirao* 47 I. A. 213 at p. 223 (=22 Bom. L. R. 1070). But in all other provinces daughters take only life estates. Vide 47 I. A. 213 at p. 221 (in which the difference between the Bombay view and the view of the other courts is explained as due to the dominating influence of the Mayūkha in the former.)

3. The word ' unprovided for ' is used in contradistinction to ' enriched ', as was held in 4 All. 243 and 47 All. 403, in both of which it was further held that the source of the provision is immaterial. The text of Gautama and the Mayūkha thereon are referred to in *Jamnabai* v. *Khimji* 14 Bom. 1 at p. 13. In *Totawa* v. *Basawa* 23 Bom. 229 it was said that the courts ought not to go minutely into the question of the poverty of daughters, yet where the difference in wealth is marked, the whole property passes to the poorest daughter. In Mithila there is no distinction between rich and poor daughters and in Bengal under Dāyabhāga the criterion is the actual or potential capacity of having male issue.

4. Nīl. has in mind Vijñānes'vara, who propounds this view in the Mit.

* P. 141 (text).

say that the word ***strī*** (in Gautama's text) is illustrative of (and so inclusive of) the father also.

In default of the daughter, the daughter's son (takes the wealth) since Viṣṇu says :[1]

When there is no continuance of the line (of a man) through son or grandson, the daughter's sons obtain the estate. In regard to the offering of obsequial rites to ancestors daughter's sons are regarded as son's sons.

In default of daughter's son, the father (succeeds) and in default of him the mother. And so Kātyāyana says :

Of him who is sonless (and dies) the widow born of a good family (who is chaste), also daughters, in default of them, the father, the mother, the brother, (brother's) sons are declared (to be heirs in order).[2]

*And Viṣṇu (Dh.[3] S. 17. 4-11) says 'wealth of the sonless goes to his wife ; in default of her, to the daughter ; in default of her, to the daughter's son ; in default of him to the father ; in default of him to the mother ; in default of her to the brother ; in default of him to the brother's son ; in default of him, to the ***sakulyas*** (agnatic kinsmen).' As for what Vijñāneśvara says, viz. that first the mother succeeds to the estate (of her deceased son) and then the father on the ground that in the clause expanding (the word ***pitarau***) which conveys its sense the word ***mātṛ*** (mother) occurs first, though in ***pitarau***, (an instance of) an ***ekaśeṣa*** which is an exception to Dvandva (compounds in general) no (particular) order is perceptible, and on the ground of following the order (of the words) in the ***dvandva*** (here ***mātāpitarau***) to which (the ***ekaśeṣa pitarau***), is an exception and on the ground that the father is common to other sons (from other wives) while the mother is not, that is refuted by the very fact of its being in conflict with these texts (of Viṣṇu and Kātyāyana) ; and (that opinion is also refuted by this viz.) there is no authority for (saying that) the word ***mātṛ*** does (must) occur first in the clause of expanding (the word ***pitarau***), for (saying that) ***ekaśeṣa*** is an exception to (the ordinary) ***dvandva***, since it (***ekaśeṣa pitarau***) is allowed optionally with

1. This does not occur in the printed Viṣṇu Dh. S. but compare Viṣṇu Dh. S. 15.47 and Manu 9.136.

2. This passage is quoted in *Advyappa* v. *Rudrava* 4 Bom. 104 at p. 114.

3. This is attributed to Bṛhad-Viṣṇu by the Mit., Vīr. and other works and to Vṛddha-Viṣṇu by the Parāśaramādhavīya. The readings of this passage as quoted in the several works differ considerably. The printed Viṣṇu reads as in the text, but omits the sūtra about the daughter's son. The Vivādaratnākara and Vivādacintāmaṇi read ' tadabhāve mātṛgāmi tadabhāve pitṛgāmi. '

* P. 142 (text).

the (regular) ***dvandva*** (***mātāpitarau***) and for saying that being common and not being common are factors that determine the order (of succession)[1].

In default of the mother, the full brother (succeeds); in default of him (i. e. the full brother), his son (succeeds). As for what Vijñānes'vara and others say, ' *in default of full brother, half brothers* (i. e. born of a different mother) succeed and in default of them (half brothers), the

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1. The whole of this section on the rights of father and mother is quoted in *Balkrishna* v. *Lakshman* 14 Bom. 605 at pp. 609--610 (in which being a case from Ratnagiri the mother was preferred to the father). The father is preferred to the mother as an heir in Gujrat, in the Bombay Island and northern Konkan where the Mayūkha is the paramount authority, while in the rest of the Bombay Presidency the mother is the preferable heir. Vide *Khodabhai* v. *Bahadar Dala* 6 Bom. 541. An adoptive mother succeeds in preference to the adoptive father in the Bombay Presidency wherever Mit. is supreme; *Anandi* v. *Hari* 33 Bom. 404. Step-mother is not included in the word ' mother ' ; vide *Kesserbai* v. *Valab* 4 Bom. 188. A remarried woman can succeed to her son by her first husband if the son dies after remarriage; *Basappa* v. *Rayava* 29 Bom. 91 (F. B.). Mother's unchastity does not debar her from succeeding; *Kojiyadu* v. *Lakshmi* 5 Mad. 149 and *Vedammal* v. *Vedanayaga* 31 Mad. 100 but vide *Ramnath* v. *Durga* 4 Cal. 550. This passage is an excellent example of the brevity and vigour of Nīlakaṇṭha's style. Nīl. first condenses the remarks of the Mit. and then refutes its reasoning. Pāṇini (II. 2. 29) lays down that several words may be compounded when they are together employed in the sense of ' *ca* ' (and) and would be in the same case (when separately employed). Such a compound is called *dvandva* ; *mātāpitarau* is an example of it. Two other sūtras (Pāṇini I. 2. 64 and 67) lay down that when several individuals of the same kind (*sarūpa*) are grouped together in the same case relation, only one of them is retained and if the two individuals are male and female, the male is retained. *Pitarau* is an example of *ekas'esa* (lit. where only one out of several is left). The general rule about *dvandva* compounds is that all the several words forming it are retained, while in such *ekaśeṣas* as *pitarau*, *bhrātarau*, only one word is present and the other (mātā, svasā) is suppressed. From this point of view *ekaśeṣa* may be said to be an exception to *dvandva*. Such compounds are very limited in number. The reasons which Mit. puts forward in preferring the mother to the father are three, (1) even in expanding the ekas'eṣa *pitarau* the word mātṛ occurs first (*mātā ca pitā ca pitarau*); (2) in the regular *dvandva* form mātāpitarau, the word mātṛ comes first; (3) the father may have several wives from whom he may have several sons i. e. the father is common to several sons whose mothers are different, while the mother is not so. Nīl. first of all says that the view of the Mit. preferring the mother is opposed to the dicta of ancient sages like Viṣṇu and Kātyāyana. Then he examines *seriatim* the reasons assigned by the Mit. He first denies that the ekas'eṣa is an exception to the *dvandva*. According to the Siddhāntakaumudī, both *Ekaśeṣa* and *Samāsa* are two out of five *vṛttis*. Besides when a certain thing is stated to be an exception the results stated as the rule do not follow at all. But *pitarau* is only an optional form, as we have *mātāpitarau* also. So Nīl. is right in saying that the *ekaśeṣa pitarau* being optionally allowed with *mātāpitarau* is not an exception. Nīl. asserts that there is no authority for saying that in expanding the word *pitarau* or in dissolving the compound *mātāpitarau* the word *mātṛ* comes first. This is an over-statement on the part of Nīl. Though Pāṇini does not say that *mātṛ* must come first, yet the *Kāśikā* and other grammatical authorities have always for ages dissolved the compound as '*mātā ca pitā ca.*' Nīl. is also right in denying that being common to the son with other sons from other wives is a ground for postponing the father. This argument of the Mit. is extremely specious. Vide notes to V. M. pp. 241—244.

sons of full brothers (succeed) ', this is not correct, since (on this view) there will be contradiction in taking the word *bhrātṛ* (in Yājñavalkya's verse) as used in two functions, viz. in the primary (function or sense) with regard to the full brother and in the figurative sense with regard to the half brother.[1] Some, however, say that in the word bhrātaraḥ (of Yāj.) there is *ekas'eṣa* of dissimilar things as expressed in the (expanded) form ' brothers and sisters are (designated) *bhrātaraḥ* ' on account of the rule (of Pāṇini I. 2. 68) ' the words *bhrātṛ* and *putra* may be compounded (respectively) with *svasṛ* and *duhitṛ* to form an *ekas'eṣa* ' and hence on failure of brothers, sisters (succeed). This (view) is incorrect, since there is no authority for taking the word ' bhrātaraḥ ' (in Yāj.) as an *ekas'eṣa* of disimilar objects.[2]

The sons of brothers[3] also, even if at the time of the death of their paternal

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1. The rule of mīmāṁsā is that the same word in a sentence must have only one sense. Vide above p. text 92 and tr. p. 83*n*. 3 Yāj. uses the word ' bhrātaraḥ '. If that word primarily means ' full brother ', the sense of 'half brother ' can be ascribed to it only in a secondary (gauṇī vṛtti) sense. The Mit. includes both full and half brothers under *bhrātaraḥ*. Nīl. says that thereby the Mit. runs counter to a well-known mīmāṁsā doctrine. Vide above p. 121*n*. 1 for s'akti meaning the primary function of a word. An obvious reply to Nīlakaṇṭha's criticism is that the word *bhrātṛ* simply means ' brother ' (whether full or half is not expressed), that the Mit. prefers the full brother to the half brother because the former has more particles of the bodies of the parents than the latter and so has greater propinquity and that if *bhrātṛ* primarily meant full brother (as Nīl. insists), Yāj. should have used (in II.138) the word *bhrātṛ* alone and not *sodara* as he does.

In *Ekoba* v. *Kashiram* 46 Bom. 716 (where a man died leaving his half brother by the same father and a half brother by the same mother who had remarried) it was held that the half brother by the same father was entitled to succeed and that there is no provision in the Mit. or elsewhere for the sons born of the same mother after her remarriage being treated as brothers born of the same womb for the purpose of inheritance so as to be included in the meaning of the word ' bhrātaraḥ ' used in the texts. But Nanda Paṇḍita in his Vaijayantī does speak of a half brother born of the same mother but of a different father as an heir. Vide *Narayan* v. *Laxman Daji* I. L. R. 51 Bom. 784 at p. 793 where references are given.

2. In *Mulji* v. *Cursandas* 24 Bom. 563 at pp. 568--69 the passage from 'some however say' to the end of the section on sister is quoted. Ordinarily ' bhrātaraḥ ' would mean ' brothers ' simply and not ' brothers and sisters '. There is nothing in the context in which the verse of Yāj. occurs to show that ' bhrātaraḥ ' is to be taken in this somewhat unusual sense. An ekas'esa may be either of similar objects or of dissimilar objects. The dual or plural form of a word is the ekas'eṣa of similar objects and the dual or plural forms of only a few words like *bhrātarau* or *bhrātaraḥ* are sometimes used as *ekaśeṣa* of dissimilar objects. The Smṛticandrikā also criticises this view following a *bhāṣyakāra* of Āp. Dh. S. Vide notes to V. M. p. 246. The Bālambhaṭṭī (which is later than the Mayūkha) held this view, but its doctrine has not been accepted in the Bombay Presidency and the sister succeeds only as gotraja. Vide *Mulji* v. *Cursandas* 24 Bom. 563, 570 (=2 Bom. L. R. 721)

3. This passage of the text is obviously suggested by the very similar words of the Mit. viz. " when the brothers of a sonless man all take an interest in his estate after his death, but before the actual partition of the estate of the deceased one of the brothers dies, then the sons of the brother (who died after taking an interest) are entitled to a share through their father and when a partition of the estate is to be made, it is proper to resort to the rule ' allotments of shares is according to the fathers '." This contemplates a case like the following: A dies

uncle they had no connection with the wealth (of the deceased uncle) because their father was then alive, are entitled to take by partition with their other paternal uncles the share of their father (in the deceased uncle's estate) according to the rule (Yāj. II. 120) ' among (claimants) sprung from different fathers the allotment of shares is according to the fathers. '

* In default of the brother's son,[1] the ***gotraja***[2] ***sapiṇḍas*** (succeed). .

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leaving B, C, D his brothers as his nearest heirs; but before the estate of A is actually divided B dies leaving two sons E and F. Here E and F have no right to the property of A at his death, as their father B was alive. Yet at the time of actual partition, they will take the share that would have gone to their father B. One has to see whether the property has vested in a person and not whether it has been actually divided. The Mit. had to state this expressly because it might be argued that as Yāj. prefers brothers to brother's sons, in dividing the wealth of A the brothers C and D should exclude the sons of B. The reply is that one must look to the time of death and not to the time of actual division of the estate.

The general rule of construction accepted by the Bombay High Court is to construe both the Mit. and the Mayūkha so as to harmonize them with one another wherever and so far as that is reasonably possible. Vide *Gojabai* v. *Shrimant Shahajirao* 17 Bom. 114, 118. Therefore the above passage of the Mayūkha must be construed in the same way as the Mit. In *Chandika* v. *Muna* 29 I. A. 70 (=24All 273=4 Bom. L. R. 376) the Privy Council following an incorrect rendering of this passage made by Borradaile remarked with regard to the tribe of Ahban Thakurs that migrated from Gujerat to the United Provinces before the Mayūkha was composed that the Mayūkha only embodied and defined a pre-existing custom and that according to the Mayūkha sons of a brother who is dead share along with surviving brothers and that the rule as found in the Mayūkha does not go beyond brothers and their children. It is submitted with great respect that there is a double error here. The Mayūkha had nothing to do with Gujerat, being composed by a Mahārāṣṭra Pandit, whose family had migrated to Benares, under the patronage of a Bundella chieftain. In *Haridas* v. *Ranchordas* 5 Bom. L. R. 516 the court following the P. C. decision allowed the son of a predeceased brother to take along with the brothers of the deceased. In *Jagubhai* v. *Kesarlal* 49 Bom. 282(=27 Bom. L. R. 226) at p. 286 the differing translations of this passage of the Mayūkha are referred to and it was held following the P. C. decision on the principle of *stare decicis* that the nephews of the deceased share the inheritance along with his surviving brother or brothers.

The distinction between the whole blood and the half blood is not to be carried beyond the brothers and their sons. Vide *Shankar* v. Kashinath 51 Bom. 194 F. B. (=29 Bom. L. R. 1), where all relevant texts and decided cases are referred to. In *Suba Singh* v. *Sarafraz* 19 All. 215 (F. B.) it was held that this distinction between whole blood and half blood applies also to all *sapiṇḍa* relations other than brothers and their sons. In *Ganga Sahai* v. *Kesri* 37 All. 545 P. C. (=42 I. A. 177) the Privy Council held that 19 All. 215 was restricted to sapiṇḍas of the same degree of descent from the common ancestor and that a paternal uncle of the half blood succeeded in preference to full paternal uncle's son.

1. In *Appaji* v. *Mohanlal* 54 Bom. 564 F. B. (=32 Bom. L. R. 709) it was held that a brother's grandson is not included in the word ' brother's son '. Vide also *Chinnasami* v. *Kunju* 35 Mad. 152 which discusses all texts and modern writers.

2. *Gotraja* literally means ' born in the *gotra* or family. ' The *gotrajas* are agnatic kinsmen and are of two kinds, *sapiṇḍas* and *samānodakas*. The Mayūkha does not dilate upon the explanation of sāpiṇḍa. It tacitly assumes the explanation of sapiṇḍa given by the Mit. In commenting upon Yāj. I. 52--53 the Mit. explains *sapiṇḍa* relationship as arising from having particles of the body of the same ancestor. It is limited to seven degrees on the father's

* P. 143 (text).

side and five degrees on the mother's side. In calculating degrees the ancestor to whom relationship is traced and the person whose *sapiṇḍa* relationship is to be ascertained are to be taken into account. Vide *Lallubhai* v. *Mankorebai* 2 Bom. 388 p. 423 and *Lallubhai* v. *Cossibai* 7 I. A. 212 at p. 232 (=5 Bom. 110 at p. 119) and *Kesserbai* v. *Hunsraj* 30 Bom. 431 at p. 443, *Ramchandra* v. *Vinayak* 41 I. A. 290 at p. 300--301 for a translation of the passage of the Mit. on *sapiṇḍa* relationship. A man's six male paternal ancestors, his six male descendants, the six male descendants through an unbroken male line of his six paternal ancestors are his *gotraja sapiṇḍas*. The samānodakas will be explained later. *Sapiṇḍas* are either *gotraja* or *bhinnagotraja* (born in a different *gotra*). The latter, according to the Mit., are called *bandhus*. In *Jadunath Kuar* v. *Bisheshar* L. R. 59 I. A. 178 at p. 190 the Privy Council say that two conditions must be satisfied before one can claim as a *gotraja sapiṇḍa* viz. a common patriarchal stock and sapiṇḍaship with the deceased i.e. blood connection through a common ancestor by unbroken male descent.

The word *baddhakrama* (lit. whose order of succession is fixed) is usually translated as ' the compact series of heirs. ' The heirs expressly specified in Yāj. from the wife to the brother's son are *baddhakrama*, take in the order in which they are enumerated and do not allow anyone else not specifically mentioned to take before them. Vide *Nahalchand* v. *Hemchand* 9 Bom. 31 at p. 34.

If certain persons are specially invited for a meeting or dinner, they are assigned special seats, while those who come uninvited or without previous intimation are seated after those who are specially invited. This maxim is made use of here in assigning a place to the paternal grandmother. Vide Jaimini V. 2·19, S'abara on Jaimini X. 5.1 and S'aṅkara's *bhāṣya* on Vedāntasūtra IV. 3.3 for illustrations of this maxim. In *Mohandas* v. *Krishnabai* 5 Bom. 597 it is said (at p. 602) that this maxim only applies to *gotrajas* and does not apply to *bandhus*.

The position of women is peculiar. The general rule in the whole of India, except in Bombay and Madras, is that no females succeed as heirs to males unless they are expressly named as heirs. There are only five such female heirs, viz. the widow, the daughter, the mother, the paternal grand-mother and the paternal great-grand-mother. In Madras a few more females such as the son's daughter, the sister, the brother's daughter succeed as *bandhus*. In the Bombay Presidency, both under the Mit. and the Mayūkha, numerous females are brought in as *gotraja sapiṇḍa* heirs and succeed to males. A woman by birth belongs to one *gotra* and by marriage passes into the *gotra* of her husband. The wife, the mother, the paternal grand-mother are not *gotraja* in the literal sense (born in the family), but they come to have the same *gotra* by marriage i. e. they become *sagotra*. The Mit. paraphrases the word *gotraja* by *sagotra* and *samānagotra* when it says, ' in this way is to be understood the succession of *sapiṇḍas* of the same *gotra* (*samānagotrāṇām sapiṇḍānām*) upto the 7 th degree. ' In *Lallubhai* v. *Mankorebai* 2 Bom. 388 (at pp. 420 and 438) it is said that, as the paternal grand-mother is specially named as an heir by Manu and as the Mit. names the paternal great-grand-mother as a *gotraja*, the term *gotraja* is not confined to males. In the same case it was said that, though the foundation of the rights of widows of *gotrajas* under the Mit. is slender and almost shadowy under the Mayūkha, the widows of *gotraja sapiṇḍas* must be admitted as heirs on the ground of positive acceptance and usage. Vide 2 Bom. 388 at p. 447 and *Lallubhai* v. *Cossibai* 7 I. A. 212 at p. 237 (=5 Bom. 110 at p. 124). Vide also *Lakshmibai* v. *Jayram* 6 Bom. H. C. R. (A. C. J.) 152. Therefore in the Bombay Presidency both under the Mit. and the Mayūkha, widows of *gotrajas* such as son's widow, brother's widow, uncle's widow are admitted as *gotraja sapiṇḍas*, though they are not expressly mentioned in those two works and though they are not born in the family but only enter the family by marriage (i. e. they are *sagotra* or *samānagotra*). They however do not take absolute estates, but only limited estates. Vide *Tuljaram* v. *Mathuradas* 5 Bom. 662. But those females who are born in the family when they take as heirs take the estate absolutely in the Bombay Presidency. In other presidencies the widows of *gotraja sapiṇḍas* not speci-

Even amongst them the first is the paternal grandmother, since Manu (9. 217) says:

When even the mother is dead, the father's mother should take the estate.

Although she (i. e. the paternal grandmother) is mentioned (by Manu) immediately after the mother, yet, as it is not possible to make room for her in the compact series (of heirs) ending with the brother's son, she should be placed at the end after the brother's son following the rule ' those that come uninvited should be seated at the end.'

In default of her (i. e. the paternal grandmother), the sister (succeeds) since Manu (9.187) says:

The wealth[1] (of the deceased) belongs to whomsoever is the nearest (to him) from amongst the ***sapiṇḍas***

and since Bṛhaspati says:

Where there are many relations, ***sakulyas*** (persons belonging to the same family or ***gotra***), and ***bāndhavas*** (***bandhus*** or cognates), he, who is the nearest of them, shall take the wealth of a childless (deceased) person

and since she (i. e. the sister) also has the status of being a ***gotraja*** equally (with her brother) as she was born in the ***gotra*** of her brother. There is not, however, (in her) the status of being a ***sagotra***; that status (of being a ***sagotra***) is not however here (i. e. in Yāj.) declared as the motive (or reason) of taking the property (of the deceased).[2]

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fically named in the Mit. and Yāj. are not heirs at all. The grand-mother does not take it as *strīdhana* (1 All. 661) and takes only a limited estate as an heir (*Dhondi* v. *Radhabai* 36 Bom. 546). The passage of the Mayūkha about the grand-mother is quoted in 2 Bom. 388 at pp. 433--34. ' Grandmother ' does not include a paternal step-grand-mother and a sister would be preferred to a paternal step-grand-mother; vide *Lingangowda* v. *Tulsawa* 17 Bom. L. R. 815.

1. This half verse is variously explained by Kullūka, the Madanapārijāta, the Bālambhaṭṭī and other works, the chief difficulty is caused by *sapiṇḍādyaḥ* and *tasya tasya*. Some take the first as equal to ' sapiṇḍāt yaḥ ' and others as one word meaning ' *sapiṇḍa* and the like '. Some take one ' tasya ' as referring to the deceased and the other to the inheritor, while others take both as referring to the inheritor, corresponding to *yaḥ* (one more *yaḥ* being suppressed for the sake of the metre). Some take *sapiṇḍāt* as meaning ' sapiṇḍamadhyāt,' while others take it as referring to the deceased. Vide *Lallubhai* v. *Mankuvarbai* 2 Bom. 388 at p. 421 for a translation of this passage as ' whoever is the nearest *sapiṇḍa* his should be the property. '

2. Nīl. stands almost alone among writers of eminence in assigning a high place to the sister as a *gotraja*. Even his own cousin Kamalākara does not do so. His reason is that the sister being born in the same *gotra* as her brother is a *gotraja* and as Yāj. speaks of *gotrajāḥ* as heirs, she is one. Nīl. admits that she is not a *sagotra*, but Yāj. does not say *sagotrāḥ* but only *gotrajāḥ*. This argument of Nīl. is extremely specious. There are two weighty objections against this argument. Whatever meaning Yāj. might have attached to the word *gotrajāḥ*, authoritative commentaries like the Mit. take it to mean *sagotrāḥ*. The sister is no doubt a sapiṇḍa, but she is not a *sagotra*. Though born in the *gotra* (and so a *gotraja* in the etymological sense), on marriage she passes into another *gotra* and so is not a *sagotra* (which is the popular conventional sense of *gotraja*). Secondly if the sister is to be re-

In default of her (the sister),[1] the paternal grandfather and half-brother take (the estate) by dividing it (equally), since their nearness to the deceased (propinquity) is equal, as (the former) is the father's father (of the deceased) and (the latter) is the son of (the deceased's) father. In other cases also, where the propinquity (of several heirs) is equal and there is no distinguishing circumstance, however slight, such as the order[2] of the words (in a text), the same (rule) holds good. Hence, in default of

garded as a *gotraja* heir because born in the *gotra*, there is no reason why other females who are born in the *gotra*, such as the son's daughter, the brother's daughter, the aunt (father's sister) should not be classed as *gotraja* heirs. But Nīl. is entirely silent about these other females. The courts hold that the reasoning of the V. M. about a sister cannot be extended to a son's daughter. Vide *Venilal v. Parjaram* 20 Bom. 173. Nīl. wanted somehow to bring in the sister and quibbles on the word *gotraja*. In *Ganesh* v. *Waghu* 27 Bom. 610 (=5 Bom. L. R. 581) the paternal grand-father's grandson being a *gotraja* was preferred to father's sister who was held to be only a *bandhu*. The Mit. *does not* mention the sister at all and brings in the paternal grandfather immediately after the paternal grandmother. In *Lallubhai* v. *Mankuvarbai* 2 Bom. 388 it is said (at p. 421) that here Borradaile's translation of the passage about the sister is infelicitous and almost unintelligible at the end and a correct rendering is given. In *Kesserbai* v. *Valab* 4 Bom. 188 at p. 200 a corrected translation of the passage about the sister is given. In *Sakharam v. Sitabai* 3 Bom. 353 it was held that a full sister succeeded in preference to a half brother in the island of Karanja near Bombay, as the Mayūkha was the paramount authority in Gujarat, Bombay island and North Konkan. But in the other parts of the Bombay Presidency where the Mitākṣarā is supreme, the result would have been exactly the opposite, as in *Bhagwan* v. *Varubai* 32 Bom. 300 (where the half brother's son was preferred to the sister). At p. 313 of this last case the passage of the Mayūkha about the sister is quoted. In *Lakshmi v. Dada* 4 Bom. 210 full sister was preferred to step-mother or paternal first cousin. In *Jana* v. *Rakhma* 43 Bom. 461 it was held that the full sister is to be preferred to the half-sister. The rule about indigent daughter succeeding before the rich one does not apply to sisters (vide *Bhagirthibai* v. *Baya* 5 Bom. 264). The sister, whether full or half, takes an absolute estate in Bombay; *Kesserbai* v. *Valub* 4 Bom. 188. The sister is not in the line of heirs at all in Bengal and Benares; 5 All. 311 F.B. and 9 Cal. 725. But this law about the sister is now changed by Act II of 1929 which enacts that the son's daughter, the daughter's daughter, sister and sister's son succeed in that order after the father's father and before the father's brother; but this Act is not to affect the sister's position as laid down in Bombay decisions (*Shidramappa* v. *Neelavabai* 35 Bom. L. R. 397).

1. The order of succession according to the Mit. is different; it is: full brother, half-brother, full brother's son, half-brother's son, paternal grandmother, paternal grandfather, paternal uncle and then his son. According to the Mayūkha the order is: full brother, full brother's son, paternal grandmother, sister, paternal grandfather and half brother together. Though the Mit. does not mention the sister as heir, under *judicial* decisions she is an heir even under the Mit., but would be placed (where the Mit. prevails in the Bombay Presidency) after half brother's son and paternal grandmother, while under the Mayūkha the full sister would come before the half brother and his son.

2. 'Krama' or 'sthāna' is one of the means for settling what things or actions are principal or subsidiary. Vide Jaimini III.3.14. 'Krama' (order) is of six kinds of which 'arthakrama' (order of the senses denoted by words) and 'pāṭhakrama' (order of words only) are two. Vide notes to V. M. p. 252 for examples. Vide *Kallianrai* v. *Ramchandra* 24 All. 128 at p. 130 for reference to this equality of nearness in the case of brother's grandson and paternal uncle's son.

them (the paternal grandfather and half-brother), the paternal great-grand-father, the uncle and the half-brother's son take (the estate) by sharing (it equally).[1] All the *sapiṇḍas* and *samānodakas* (take) in the order of their propinquity. Manu (V. 60) declares them as follows:

The *sapiṇḍa* relationship ceases with the seventh person (in the line) and that of *samānodakas* ends when birth and name are no longer known.[2]

(*Saptame*) means after the seventh (person) is reached (or has passed away).

In default[3] of *sodakas* (i. e. samānodakas) *bandhus* (take as heirs),

1. The treatment of the subject of inheritance after the sister in the Mayūkha is very scrappy, vague and unsatisfactory. Even the Mit. gives more details. The latter distinctly states that after the father's line come in order the paternal grandmother, paternal grandfather, uncle, uncle's son; after the paternal grandfather's line come in order the paternal great-grandmother, the paternal great-grandfather, grand-uncle and his son; that in this way up to the seventh person (from the deceased) is to be understood the right of succession in the case of 'samānagotra sapiṇḍas'. The Mayūkha is quite silent about the great-grandmother. It does not expressly refer to lines beyond the great-grand-father, nor does it clearly state how many generations in each line are to be taken. The following propositions have been established by judicial decisions: (I) That the nearer line excludes the more remote i. e. a male in the father's line excludes a male in the grandfather's line and the latter excludes the great-grand-father's line; (II) that the widow of a gotraja sapiṇḍa in one line is postponed to any male properly belonging to that line (e. g. a paternal uncle's grandson is to be preferred to a paternal uncle's widow as in *Kashibai* v. *Moreshwar* 35. Bom. 389 = 13 Bom. L. R. 552.); (III) but the widow of a gotraja sapiṇḍa of a nearer line excludes a male belonging to a remote line e. g. a brother's widow is a nearer heir than a paternal uncle's son or the grandson of the grand-uncle; *Basangavda* v. *Basangavda* 39 Bom. 87 = 16 Bom. L. R. 699 and *Khanducharya* v. *Govindacharya* 13 Bom. L. R. 1005. As regards what is meant by line (*santāna* in the Mit.) there was great divergence of view; vide *Buddhasing* v. *Laltusing* 42 I. A. 208 = 37 All. 604 for reference to three different views. It may be assumed that according to the Bombay view each line extends to six descendants in the main line from the common ancestor (i. e. inclusive of the common ancestor there are seven generations in each line who are sapiṇḍas and also *gotrajas*). Vide *Rachava* v. *Kalingappa* 16 Bom. 716, *Appaji* v. *Mohanlal* 32 Bom. L. R. 709 (F.B.). In *Vithalrao* v. *Ramrao* 24 Bom. 317 at p. 334 four meanings of the word *pratyāsatti* (nearness) are given and it is said at p. 338 that the Mayūkha theory of propinquity is of descent in line and degree from the common ancestor and that inheritance through a common female ancestor is unknown. In *Garuddas* v. *Laldas* 35 Bom. L. R. 597 (P. C.) it was laid down overruling 24 Bom. 317 and 51 Bom. 194 that the preference of whole blood over half blood extends to all heirs of the same degree such as paternal uncles and is not confined to brothers or brother's sons.

2. This whole passage about sapiṇḍas and samānodakas is quoted in *Bai Devkore* v. *Amritram* 10 Bom. 372 at p. 380 and it was held that 'samānodaka' includes descendants from a common (male) ancestor more remotely related than the 13th degree from the propositus and that a *samānodaka* is to be preferred to a *bandhu*, but *Rama Row* v. *Kuttiya* 40 Mad. 654 dissents from 10 Bom. 372 and holds that a samānodaka must be within 14 degrees from the common ancestor. Vide *Haribhai* v. *Mathur* 47 Bom. 940 at p. 942 for quotation about sapiṇḍas and samānodakas.

3. *Bandhu*, according to the Mit., is a sapiṇḍa but of a different *gotra* i. e. they are cognate kindred who are related to the *propositus* through a female and not through an unbroken male descent. This section about *bandhus* is quoted or referred to in numerous cases; vide e. g. *Shā Chamanlal* v. *Doshi* 28 Bom. 453 (=6 Bom. L. R. 460) at pp. 455-56, *Ramcharan* v. *Rahim* 38 All. 416 at p. 421, *Parot Bapalal* v. *Mehta Harilal* 19 Bom. 631, *Muthuswami* v. *Sunambedu* 23 I. A. 83 at p. 89 (=19 Mad. 405).

And they are (thus stated) in another *smṛti*:

* The sons of one's father's sister, the sons of one's mother's sister and the sons of one's maternal uncle-these are to be known as *ātmabandhus*; the sons of one's father's father's sister, the sons of one's father's mother's sister, the sons of one's father's maternal uncle-these are to be known as one's *pitṛbandhus*; the sons of one's mother's father's sister, the sons of one's mother's mother's sister, the sons of one's mother's maternal uncle-these are to be known as one's *mātṛbandhus*.

Here[1] (i. e. in the texts quoted) the order (of succession) is that which is conveyed by the order of the words of the text.

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1. In *Gridhari* v. *The Government of Bengal* 12 Moore's Indian Appeals 448 it was held that the enumeration of bandhus is only illustrative and not exhaustive and that the maternal uncle though not mentioned here is a very near *bandhu* and would succeed in preference to his own son, who is specifically mentioned. Following this case it was said in 28 I.A.83 (at p. 89) that the Mit. rather classifies by sample without attempting to specify every member of each class. The words ' here the order &c. ' are quoted in *Mohandas* v. *Krishnabai* 5 Bom. 597 at p. 602 and it is said that this remark only applies to the preference of *ātmabandhus* to *pitṛbandhus* and of *pitṛbandhus* to *mātṛbandhus* and that there is nothing in the Mit. or Mayūkha ' which can be construed into a direction that the nine specified *bandhus* are to take precedence of all unspecified bandhus ' and that the text of Manu (9.187) furnishes the proper ground for decision. This remark ' here the order &c. ' is quoted in *Rajeppa* v. *Gangappa* 47 Bom. 48 at pp. 51 and 53 and it is held that it does not refer to preference among *ātmabandhus inter se*. Mandlik's footnote ' this applies to the three classes as well as to the several members of the three classes ' was quoted with approval in *Appandai* v. *Bagupali* 33 Mad. 439 at p. 442 (where mother's sister's son was preferred to maternal uncle's son) but it was disapproved in *Sakharam* v. *Balkrishna* 49 Bom. 739 F.B. at p. 753 (=27 Bom. L. R. 1003) and the case in 33 Mad. 439 was dissented from in 38 All. 416 at p. 424. The decision in 33 Mad. 439 was dissented from in 48 Mad. 722 where the Mayūkha is quoted at p. 742.

There is a bewildering mass of cases on the succession of bandhus and it is impossible to reconcile the decisions. Besides some principles have been introduced by the decisions which have no direct basis in the texts or commentaries. In *Umaid Bahadur* v. *Udoichand* 6 Cal. 119 (F. B.) it was assumed that there must be mutuality of *sapiṇḍa* relationship between the person claiming as *bandhu* and the *propositus* and that in order that a man may be an heritable *bandhu* of the propositus they must be related either directly through themselves or through their mother or father. In *Ramchandra* v. *Vinayak* 41 I.A. p. 290 (=42 Cal.384) the above propositions were accepted and it was said that *sapiṇḍa* relationship in the case of *bandhus* extends only up to five degrees (relying on the Mit. ' on the mother's side in the mother's line after the fifth ' &c.). It is submitted with great respect that all these propositions are based on no solid textual authority and are not supported by sound reasoning. If the enumeration of bandhus in the three verses quoted in all digests is not exhaustive but only illustrative, how can it be said that the relationship must be only through one's self or one's mother or father ? Similarly, if sapiṇḍa relationship extends to seven degrees on a man's father's side and five degrees on a man's mother's side (Yāj. I. 53), a *bandhu* (who is a bhinnagotra sapiṇḍa) may be so provided he is within seven degrees on his father's side from the common ancestor of himself and deceased. Vide *Rama Sia* v. *Bua* 47 All. 10. The text of Manu (9.187) on which the requirement of mutuality is based has not been correctly interpreted. Vide *Subramania* v. *Ranganathan* 44 Mad. 114 at p. 117 and *Chinna*

* P. 144 (text).

(If an objection were raised that) as the right to the wealth (i. e. inheritance to the deceased) in the case of the wife and all the other heirs is based on their being directly connected with the deceased, so in the case of the *bandhus* also let the same rule be followed ; hence how is it that the *bandhus* of the father and mother (of the deceased) are (declared) to be entitled to the wealth (of the deceased) ? The (two) verses 'the sons of the father's father's sister &c.' are meant only to convey the connection between a term (sañjñā, here *pitṛbandhu* and *mātṛbandhu*) and the objects denoted by it and not to convey the connection of these with the wealth (of the deceased). (We reply) since even without this text (i. e. the two verses about *pitṛbandhus* and *mātṛbandhus*) it is possible to employ the word (*bāndhava or bandhu*) for the *bandhus* of the father and mother on

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Pichu v. *Padmanabha* 44 Mad. 121 at p. 128, where Sadashiva Ayyar J says that the verse about *atmabandhus* is a childish and spurious text and that it is an illogical, incomplete and inconsistent classification of *bandhus* and criticizes the doctrine of mutuality as fallacious (at p. 130) and (at pp. 128--129) the dictum in 6 Cal. 119 (at p. 128) that 'the heritable *bandhu* must be a descendant of the maternal grandfather of the propositus or of the father or mother of the propositus is wrong. This opinion of Sadashiv Ayyar J is criticized in 44 Mad. 753 (P. C.) at p. 761 (=48 I. A. 349). Vide 49 Mad. 652 at pp. 660--662 for criticism of Sarvadhikari's rules and of 6 Cal. 119. Great confusion is caused by judges giving varying reasons for preferring one *bandhu* belonging to one class over another *bandhu* of the same class e. g. where the claimaints are equally related in degree to the deceased, a male is to be preferred to a female (*Narasimma* v. *Mangammal* 13 Mad. 10, *Balkrishna* v. *Ramkrishna* 45 Bom. 353.); sometimes the ground stated is said to be that *bandhus ex parte paterna* are preferred to *ex parte materna* (*Saguna* v. *Sadashiva* 26 Bom. 710 and 55 Cal.1158), that those between whom and the *propositus* a single female intervners are to be preferred to those between whom and the propositus two females intervene (30 Mad. 406, which is not accepted by *Rajeppa* v. *Gangappa* 47 Bom. 48) ; even where the Mitākṣarā law applies it was held by the Privy Council that those bandhus who confer greater spiritual efficacy are to be preferred to others, though of the same class and though equally near in degree, who confer less spiritual benefit. Vide *Jotindra Nath* v. *Nagendra Nath*, 33 Bom. L. R. 1411 (P. C.) where the son of a half-sister of the father of the propositus was preferred to the son of the sister of his mother. As regards *bandhus* specifically named in the verses conflicting decisions have been given e. g. 48 Mad. 722 holds that the maternal uncle's son is to be preferred to the maternal aunt's son, while in *Rajeppa* v. *Gangappa* 47 Bom. 48 those two bandhus were held entitled to succeed equally. The following cases will give some idea of the complexities of the problems involved ; *Muthusami* v. *Muthukumarsami* 16 Mad. 23 at p. 30 (same case in P. C. as 19 Mad. 405) sets forth four propositions which are approved of in *Vedachala* v. *Subramania* 48 I. A. 349 at p. 360 =44 Mad. 753 at p. 763 ; *Adit Narayan* v. *Mahabir* 48 I. A. 86, *Kenchava* v. *Girimallappa* 48 Bom. 569 (P.C.)=57 I. A. 368, *Sakharam* v. *Balkrishna* 49 Bom. 739 (F. B.) = 27 Bom. L. R. 1003 ; *Umashankar* v. *Mussummat Nageswari* 3 Patna L. J. 633 (F. B.), *Gajadhar* v. *Gaurishankar* 54 All. 698 F. B., which holds that Sarvadhikari's rules are substantially correct and arrives at a conclusion exactly opposite to that in 49. Mad. 652. In order to prevent uncertainty and wasteful litigation consequent thereon it is extremely desirable that the Legislature should at once intervene by enacting a simple and easily applicable method of indicating preference among *bandhus*.

account of its etymological meaning[1] just as it is applicable to the maternal uncle of the father and the paternal uncle of the father, it would follow as (an unacceptable) conclusion that it (the text of these two verses) is useless (superfluous) for conveying the connection between a term and the objects denoted by it. Therefore this text (of the two verses about *pitṛbandhu* and *mātṛbandhu*) can have a purpose (i. e. will not become superfluous) only by its being (understood as) conveying that the *bandhus* of the father and mother (of the deceased are meant to be included) in the rule laying down as regards *bandhus* their connection with (i. e. right of inheritance to) the wealth (of the deceased). The same is the case even as regards the rule of mourning with reference to *bandhus*[2].

In default of *bandhus* the preceptor (is the heir); on failure of him the pupil, since Āpastamba (Dh. S. II. 6. 14. 2--3) says:

> 'On failure of male issue, the nearest *sapiṇḍa*; in default of the latter, the preceptor, in default of the preceptor the pupil.'

In default of the pupil, a fellow-student, in default of a fellow-student a brāhmaṇa learned in the Vedas, since Gautama (28. 39) says, 'brāhmaṇas learned in the Vedas should take the heritage of a childless brāhmaṇa'. In default of a s'rotriya, any other brāhmaṇa in conformity with Kātyāyana's dictum:

> In default of all (these heirs), brāhmaṇas who are versed in the three Vedas, are pure and self-restrained take the heritage. (By doing) so, *dharma* is not lost (violated).

* And Nārada says:

> In all these cases the king should take heirless wealth, except the property of a brāhmaṇa[3]; but the property of a brāhmaṇa which is without an heir, he should cause to be given to brāhmaṇas learned in the Vedas.

Bṛhaspati (p. 380 v. 67) says:

> The king takes the wealth of those kṣatriyas, vais'yas and s'ūdras who leave no male issue and have neither wife nor brother, for he is the lord of everything.

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1. '*Bandhu*' or '*bāndhava*' is derived from the root 'bandh' (to bind) and means 'he who is bound by ties of blood.'

2. The idea is that when it is said that the mourning for a *bandhu* is to be observed for a particular period, the *bandhus* of the father and mother of the man are also included. Vide Mit. on Yāj. III. 24.

3. This direction of the ancient sages has not been respected in modern times. Vide *Collector of Masulipatam* v. *Cavaly Venkata* 8 Moore's Indian Appeals 500 at p. 527. Where a widow built a house and died leaving no heirs of her husband and the Government claimed the house, it was held that Government must prove that the house was built out of her husband's estate and that the widow's blood relations (brother and sister) would take her strīdhana in preference to the crown (*Ganpat Rama* v. *Secretary of State* 45 Bom. 1106.).

* P. 145 (text).

Yājñavalkya (II. 137) states a special rule about the wealth of ascetics and the like :

(the heirs who take the wealth of a ***vānaprastha*** (a forest hermit), of a ***yati*** (an ascetic) and of a ***brahmacārin*** (a Vedic student) are in order the preceptor, a virtuous pupil, one who is accepted (or looked upon) as a brother and belongs to the same order.

(The word) ***brahamacārī*** stands for the perpetual[1] student ; but in the case of an upakurvāṇa (a temporary student), the father and the rest alone are heirs : ' dharmabhrātā ' means ' one who is accepted as a brother, ' Ekatīrtha ' means one who belongs to the same ās'rama (i. e. order); (the word) ' dharmabhrārtraikatīrthin ' (in Yāj.) is a karmadhāraya (appositional compound) meaning ' one who is accepted as a brother and is also of the same order '. Vijñānes'vara (holds) that the order in which the preceptor and the rest (succeeded) is the reverse[2] (of the order of the words of the text), while Madana (holds) that the order is the direct one, since Viṣṇu (17. 15–16) says ' the preceptor or the pupil should take the wealth of a forest hermit. '

The funeral[3] rites of the deceased up to the end of the tenth day (after death) must be performed by him who takes his wealth, whoever he may be. And Viṣṇu (XV. 40) is to the same effect ' whoever takes the wealth is declared to be the giver of the ***piṇḍa*** (the funeral cake) '. This (topic) has been expounded by me in the S'rāddha-Mayūkha in the section determining the (order of) persons entitled to perform (s'rāddhas).

1. A *brahmacārin* is of two sorts, *naiṣṭhika* (one who remains a student till his death and does not marry) and *upakurvāṇa* (one who intends to remain a student for some years only and to get married thereafter). Vide Gautama 3. 5-9 for the former. The ās'ramas are four, that of brahmacārin, of an house-holder, of a forest hermit and of an ascetic (sannyāsin).

2. ' Reverse '— According to Vijñānes'vara, the heirs to a hermit, *yati* and *brahmacārin* are respectively the person accepted as a brother and belonging to the same order' (i. e. a vānaprastha), a virtuous pupil and the preceptor. It will be noticed that the heirs according to Mit. are in inverse order to the order of the words in the text. In *Ramdas* v. *Baldevdas* 30 Bom. 168 (= 16 Bom. L. R. 757) it was held that the heir of a *sannyāsin* (*yati*) was a virtuous pupil and that it was doubtful whether *bairagis* belonging the Vaiṣṇava Rāmānandi sect could be classed as *sannyāsins* since the order of bairagis was not confined to the members of the twice-born classes. In *Dharmapuram Pandara Sannadhi* v. *Virapandiam* 22 Mad. 302 it was held that a s'ūdra cannot be a *yati* (or ascetic) and that succession to a s'ūdra leading the life of an ascetic was governed by the ordinary law in the absence of any general or special usage to the contrary. But in *Sambashivam Pillai* v. *The Secretary of State for India* 44 Mad. 704 it was held distinguishing 22 Mad. 302 that the disciple of a *śūdra* ascetic who died without leaving any blood relations is an heir under Hindu Law and prevents an escheat to the crown and that the text of Yāj. about the succession of the pupil was not obsolete.

3. This passage up to the end of Viṣṇu's text is quoted in *Kalgauda* v. *Somappa* 11 Bom. L. R. 797 at p. 815.

Now (begins) the discourse on reunited persons.

On this Bṛhaspati (p. 381 v. 72) describes reunion: [1]

That man who being (once) separated dwells again through affection with his father, brother or uncle is said to be reunited with him.

* According to the Mitākṣarā and the rest reunion (of a man) can take place only with his father, brother or paternal uncle and not with any one else, since (others) are not mentioned in the text; but it is proper to say that it (re-union) takes place so as to be co-extensive with those who make the partition; the words 'father and the rest' (in the verse of Bṛhaspati) are only illustrative of those who made the partition; just as in the case of the (Vedic sentence) ' he plants the post half inside the altar and half outside. '[2] Otherwise there would be the fault of the splitting up of the sentence.[3] Hence re-union may take place even with (one's) wife, paternal grandfather, brother's grandson, paternal uncle's son and the like.[4] On account of the same case relation (being employed in the text of Bṛ.) in the form ' he is reunited who having been separated lives together again ' there can be no reunion between the sons of separated brothers[5]. Reunion means a wish or intention (expressed) in the form ' our present or future wealth shall be common (between us) until a fresh partition '.

On this subject Manu(IX. 210) declares a special rule about a fresh partition between reunited persons :

If reunited[6] (members) dwelling together should again come to a division

1. Bṛhaspati's text is quoted in 19. Cal. 634 at p. 638 where it is held that according to the Dāyabhāga it is not illustrative but mandatory and| that there can be no re-union except between the persons specified. In *Basant Kumar* v. *Jogendra* 33 Cal. 371 it was held that there cannot be according to the Mit. reunion between first cousins who were originally joint, but had separated. In *Balabux* v. *Rakhmabai* 30 I. A. 130 at p. 136 (= 5 Bom. L. R. 469 and 30 Cal. 725) the text of Bṛhaspati is quoted and it is said that reunion can take place only between persons who were parties to the original partition.

2. Vide text above p. 115 and tr. p. 123 for this sentence.

3. For explanation of *vākyabheda* vide p. 90 *n*. 1 above. The two rules (vidhis) which this single text of Bṛhaspati is supposed by the Mit. as laying down are: (1) re-union takes place when separated coparceners again begin to live together and (2) that reunion can take place only between the three classes of persons specified.

4. In *Lakshman* v. *Satyabhamabai* 2 Bom. 494 at p. 503 it is said about this passage relating to the wife that it ' implies a previous partition in the sense probably of the allotment of a share in a division with sons ' and then the text of Āpastamba ' jāyāpatyor-na vibhāgo vidyate ' is quoted.

5. The words ' vibhaktaḥ, sthitaḥ and saṁsṛṣṭaḥ ' are in the same case (i. e. nominative) and so the circumstances connoted by them must all inhere in the same person. In *Samudrala Varaha* v. *Samudrala Venkata* 33 Mad. 165 it was held that succession in a reunited family was by survivorship and that that mode of succession was not confined to the members that reunited but the son of a reunited member born after reunion is also reunited and takes by survivorship.

6. The printed Manu reads ' vibhaktāḥ ' for ' saṁsṛṣṭāḥ '.

* P. 146 (text).

then the shares are equal; in such a case the right of primogeniture does not exist.

Here some say that unequal distribution being negatived (or prohibited) by the clause ' the shares are then equal ' itself, the purpose of again expressly *forbidding the right of primogeniture* (*in the words* ' jyaiṣṭhyam tatra na vidyate ') is to convey that there is no inequality due to mere seniority (in birth) but there may be inequality at the time of fresh partition due to the inequality of estate (put together) at the time of reunion[1]. But others[2] say as follows: since the clause beginning with the word ' jyaiṣṭhyam ' (in Manu) is merely a repetition (of what precedes), the shares will be equal even when there was inequality of wealth (brought into hotchpot at the time of reunion). And usage is to the same effect. Hence when it is possible to explain this text (of Manu) as based on usage it is improper to imagine a Vedic text opposed to it. And the science of judicial administration is generally based, like grammar, on the usages (of the people).[3]

Bṛhaspati (p. 381 v. 77) says:

> *If any one of the reunited members acquires wealth by learning, valour and the like, two shares (of it) must be given to him and the rest are entitled to equal shares.

When from the rule that the acquirer gets two shares two shares are established (even in the case of the re-united acquirer) this text (of Bṛ.) has a purpose of its own in indicating that, though two shares are allotted to the acquirer in a partition among coparceners who are not re-united provided the acquisition is made without detriment to the ancestral wealth, in a partition between re-united coparceners two shares are allotted (to the acquirer) even when the acquisition is made with detriment to the re-united property[4]. This is the view of Madana

Yājñavalkya (II. 138) states the persons who are entitled to take the estate of one reunited:

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1. This is the view of Aparārka, Sm. C. and Vir.

2. This is the view of Nīlakaṇṭha. If the text of Manu were interpreted as some do, we shall have to assume a rule opposed to the one laying down equal division in those cases where at the time of reunion there was inequality in the wealth contributed by the reunited members. But if the words ' jyaiṣṭhyam ' are taken as a mere repetition (*anuvāda*) of what precedes in another form there is no necessity to assume a text and popular usage will be followed by the text of Manu, who says ' usage is transcendental law ' (I. 108).

3. Vide as to grammar notes to V. M. p. 264.

4. Mandlik (tr. p. 85) and Gharpure (tr. p. 120) both understand ' arjakasya dvau bhāgau ' as a text, but they do not state where that text is to be found. It appears that those words are not a quotation but summarise the rule stated in Vas. (17.51). According to Madana this verse of Bṛ. does not merely re-iterate what Vas. says, but has a special purpose of its own. Madana starts with a proposition which is not acceptable to Nīlakaṇṭha who says above (p.187) that even when wealth is acquired by a man with the help of ancestral estate the acquirer gets two shares. The Sm. C., Vir. and Par. M. explain this verse differently. Vide notes to V. M. p. 206.

* P. 147 (text).

A reunited (person) takes (the estate) of a re-united co-heir (who dies); but a full brother (takes the wealth of) a full brother (dying).

This is an exception to the rule contained in the text 'the wife, daughters &c.' (Yāj. II. 135). Hence the meaning is: what determines the right of heirship for taking reunited wealth is not the relationship of being a wife &c. but the fact of being a re-united member (with another), The opinion of Vijñānes'vara, Madana and others is: since it is a general rule that an exception has the same province (scope) as the rule (to which it is an exception) and since the words 'of one dying without male issue' (occurring in the preceding verse, Yāj. II. 136) are to be supplied as connected (with this text), it also (Yaj II. 138) applies to one who leaves no son, grand-son or great-grand-son; therefore a reunited (coparcener) alone will take the wealth of a deceased reunited coparcener of that sort (i. e. one who has no male issue), even though nearer (persons) like the wife and the rest exist, who are not reunited with him (the deceased) [1]. This (opinion) is open to question. When it is possible to explain (a text) without it (i. e. without resort to the principle of *anuṣaṅga*), there is no authority for supplying (clauses from a previous text) [2]. As for the sameness of province (between a rule and an exception), it is not expected that it (sameness of province) should be complete in every respect, but only to this extent that somehow both[3] (rule and exception) relate to (the right of succession among) the *sapiṇḍas* of the deceased. It may be objected that if the word 'of one sonless' is not to be supplied (in Yāj. II. 138) then the word 'of one gone to heaven' also cannot be supplied (in the same verse) and the result would be that there would be no word meaning 'of one deceased' (with which to connect the verse Yāj. II. 138). (To this the reply is:) it would not be so; since that term (viz. of one deceased) can be got from the words of Manu (9. 211) to be quoted hereafter viz. 'if he were to be excluded from a share or if any one of them dies.'[4] If that term (viz of one sonless) be supplied (in Yāj. II. 138) the (unacceptable) result would follow that of two sons or of a son and grandson, one being re-united with the father and the other not so re-united both will get equal

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1. In the text on p. 147 read '∘मृतसंसृष्टिधनमसंसृष्टसंनिहित∘' for 'मृतसंसृष्टिधनसंसृष्टसंनिहित ∘'.

2. *Anuṣaṅga* is a technical term in the Pūrvamīmāṁsā (II. 1. 48) which means 'supplying a word or words from one sentence into another sentence or passage'. Vide notes to V. M. pp. 266--267.

3. The rule 'wife, daughters &c.' and the exception 'a reunited coparcener takes the estate of a reunited coparcener' have this in common that they both relate to the succession of *sapiṇḍas* to a deceased person.

4. The verse of Manu (9.211) occurs in the context of reunion and therefore Yājñavalkya's verse (II. 138) can be connected with it and it is not necessary to understand certain words like 'svaryātasya' and 'aputrasya' from Yāj. II. 136 into Yāj. II. 138. The maxim of interpretation is that all smṛti texts bearing on a topic are to be read together and supplement each other.

*shares (in the deceased father's property) since (on that hypothesis) this text would have no application to one (a deceased reunited person) dying after leaving a son.[1] In that case the result would be opposed to popular usage which is the basis of the authoritativeness of the science of *vyavahāra* (law and judicial administration). (An objection may be raised that) if (the word aputrasya) be not supplied (in Yāj. II. 138), this verse will be applicable also to one who dies reunited leaving a son and then in a competition between a son who is not reunited (with his deceased father) and a brother and the rest who are reunited (with the deceased), the brother and the rest alone (who are reunited) will get (the estate of the deceased) and not the son and the like (who are not reunited). (The reply is that) it is not so and (the objection) will be answered in explaining the latter half of this verse (Yāj. II. 138).

(The author) states (in the words ' sodarasya &c.) an exception to what is laid down in this first quarter of the verse (viz. ' of one reunited, the reunited coparcener ') : here the words ' saṁsṛṣṭinaḥ saṁsṛṣṭī ' are understood (in the second quarter). The meaning (of the second quarter) is that in a competition between a full brother and a half brother, both being reunited (with the deceased), the full brother who is reunited should take the wealth of the deceased reunited member. The latter half of the verse (Yāj. II. 138) is ' dadyāt &c '. The meaning (of this latter half) is : if at the time of dividing the estate of a deceased re-united member the pregnancy of his wife was not ascertained and a son is subsequently born, the paternal uncle or the like who was reunited (with the deceased) should deliver the share (of the deceased) to such a son, but in the absence of a son he should take the share himself.[2] Here the mere fact of being a son determines the right to take the share of (the deceased) father and not the fact of being born after the partition (between the surviving reunited coparceners), because the latter supposition serves no purpose, is cumbrous and would lead to the (unacceptable) result that a son born to a reunited coparcener in a distant country before partition would not be entitled to share (his father's estate) if the fact (of his birth) was not known (to the partitioning members). Therefore an uncle or the like though reunited must give the share (of the deceased reunited member) to his son previously born, though not reunited (with the deceased).

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1. If ' aputrasya ' were supplied in Yāj. II. 138, that verse would have no application to a reunited person who left male issue. Then the result would be that if a man died reunited with a son and also left a son or grandson who was not reunited, both sons would take shares, as the verse ' of one reunited, a reunited coparcenor takes the wealth ' applies on the hypothesis supposed only to one dying issueless.

2. The Mit. and the Mayūkha widely differ as to the interpretation of Yāj. II. 138 The Mit. supplies the word ' aputrasya ' in it, Nīlakaṇṭha does not. The Mit. connects the first half of II. 138 with the latter half, while Nīl. takes the two halves as independent. Vide notes to V. M. pp. 268--270 for details.

* P. 148 (text).

The same author (Yāj. II. 139) propounds the right of a reunited half brother and a full brother not reunited to share equally the wealth (of the deceased brother):

> One born of a different mother, if reunited, may take the wealth (of the deceased), but one born of a different mother, if not reunited, does not take it ; (a full brother) even though not reunited should take (the wealth) and not the half brother (alone) though reunited.

Here by the expressions ' born of a different womb ', ' born of a different mother ' and the like the half brother alone is not denoted, but the paternal uncle and the like also, *since the etymological meaning (of these words) applies to them also without any distinction[1]. Otherwise it would follow that the text propounding reunion with the uncle and the rest is without any purpose, there being no other result brought about by the state of reunion.[2] The words ' asaṁsṛṣṭyapi ' are connected with both the preceding and the succeeding clauses like a lamp on a threshold.[3] And the word ' saṁsṛṣṭa ' by being repeated conveys one who is reunited in wealth and also a full brother who is related to the same womb (as the deceased).[4] When the first meaning of saṁsṛṣṭa (viz. one reunited in wealth) is taken the word ' api ' (also) is to be understood after it and at the end of the verse the word ' eva ' (alone) is to be supplied. Hence the following are the meanings of the sentences (of this verse) :-(1) *anyodarya* i. e. one born of a different womb such as the wife, father, paternal grandfather, half brother, paternal uncle and the like, if reunited (with the deceased), takes the wealth (of the deceased) ; (2) one born of another womb, if not reunited, does not take (the wealth). By this reunion is declared by the method[5] of positive assertion and that of negation as the cause of taking wealth (as heir) in the case of one born of a different womb ; (3) The full

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1. The paternal uncle of a person is as much born of a different mother as his half brother.

2. What is the purpose of reunion ? It is this that the reunited man should succeed to the wealth of a reunited deceased person in preference to another relative equally related but not reunited. As among half brothers, one who is reunited takes in preference to one who is not re-united, so the same rule should apply to paternal uncles. If reunion were not a ground of preference among paternal uncles, a paternal uncle stands to gain nothing by reunion.

3. A lamp on the threshold sheds light inside the house and also outside. So the words ' असंसृष्टयपि ' are to be connected with the preceding clause नान्योदर्यो धनं हरेत् and also with the succeeding one चादद्यात् संसृष्टः .

4. संसृष्ट has two meanings, (1) one reunited and (2) a full brother. In the latter half of II. 139 we have two clauses असंसृष्टयपि चादद्यात्संसृष्टः (full brother) and संसृष्टः (one reunited) (अपि) अन्यमातृज (एव) न (गृह्णीयात्).

5. ' Whoever is reunited takes the wealth of the deceased. ' This is the method of *anvaya* (positive declaration) ; ' those who are not reunited do not take the wealth ' (when there is reunion with some); this is the method of vyatireka (negation or absence).

* P. 140 (text).

brother called here 'saṁsṛṣṭi' takes the wealth, even though he be not reunited; by this the fact of being a full brother is itself declared to be a cause (of taking wealth); (4) a 'saṁsṛṣṭa' i. e. one whose wealth is reunited, but born of a different mother, does not alone take the wealth. Hence the conclusion is that both take the wealth in equal shares, one because he is reunited (though born of a different mother), the other because he is a full brother (though not reunited). Manu (9. 211-212) makes this very point clear in his section on reunited coparceners:

> If the eldest or youngest of several brothers were to be deprived of his share or if any one of them were to die, his share is not lost; but the full brothers and reunited coparceners and the full sisters should assemble together and should divide that share equally.

'Hīyeta' (be deprived of) means 'by entrance into another order (of ascetics &c.), by degradation for sins and the like'.[1] The word 'sodaryāḥ' is connected with 'brothers' (in the latter half). 'Those who* are reunited' mean the wife, the father, paternal grandfather, half brother, the paternal uncle and the like.[2] On this point Prajāpati states a special rule:

> Whatever concealable wealth (like gold and silver) exists is taken by the reunited members (though born of a different mother); but lands and houses are taken according to their shares by (full brothers) though not reunited.

'Antardhanam' means gold, silver and the like which it is possible to conceal by being deposited underground &c.; 'saṁsṛṣṭaḥ' i. e. a reunited member born of a different womb should take it; but full brothers should take lands; and cows, horses and the like should be taken by brothers full and half. This is the meaning. Madana says that a reunited coparcener though born of a different womb, alone takes even kine, horses and the like. But this (view) is not based on the text (of Prajāpati). In the Smṛti-candrikā (it is said that) the full brother alone, though not reunited, takes when what is left (by the dying member) is either concealable wealth or land or kine and the like. The authority (or basis) for this view is questionable. Among full brothers, if some are reunited and others are not reunited, the reunited (full brothers) alone should take the wealth,

In *Bindra* v. *Mathura* 6 Lucknow 456 (F. B.) it is said that while the general rule as regards reunited members is that of succession by survivorship, an exception giving preference to uterine (*sodara*) brother not reunited has been engrafted to that rule and that under the Mitākṣarā a uterine (*sodara*) brother though not reunited succeeds as against the father (of the deceased) though reunited.

1. The section on exclusion from inheritance below sets out the circumstances under which a man was deprived of his share or right to inherit.

2. Vide notes to V. M. pp. 273--275 for the varying interpretations of the two verses of Yāj. (II. 138--139) and of Manu (9. 211--212).

* P. 150 (text).

because of the existence (in their case) of two reasons (for taking wealth) viz. being a full brother and being reunited. Hence Gautama (28, 26) says: When a reunited (coparcener) dies, one reunited takes the wealth. Bṛhaspati (p. 381 v. 76) says:

(Two coparceners) who again (i. e. after separating) become reunited through affection take the share of each other (on death).

The following then is the essence extracted from the above (discussion): The son whether reunited with his father or not should take the whole share of his father, since the fact of being a son is alone the determining factor as regards the rights to take the share. Even among sons if one is reunited and the other is not, then the (son) reunited alone takes (the whole share), since the text says ' of one reunited, the reunited ' (Yāj. II. 138). In a competition between a son reunited and any reunited person other than a son the son alone (takes the wealth), since this has been expounded above, on the words ' dadyāc-cāpaharec-cāṁs'am ' (Yāj. II. 138 latter half). In a competition between reunited persons other than the son such as the parents the brothers, paternal uncles and the like, the parents* alone take. Among them (the parents), Madana says[1] that the mother takes first and then the father. The brother, uncles and the like (when all are reunited) should take (the wealth of a deceased reunited coparcener) by sharing it equally, since the determining factor for being entitled to take the estate viz. state of reunion, exists in the case of all of them. When there is a competition between a (full) brother not reunited (on the one hand) and a paternal uncle, half brother or the like (on the other) who is reunited, they take after dividing equally, since Yāj. (II. 139 and 138) ;

A full brother even though not reunited should take the wealth and not the half brother (alone) though reunited ; of a reunited (coparcener) the reunited coparcener ; but in the case of a full brother, the full brother.

If there is only the wife who is reunited (with the deceased) she alone takes, since the text is ' of a reunited coparcener, the reunited coparcener '. When there is a competition (assemblage) between the wife who is reunited and other males who are reunited, they alone take and not she. So also S'aṅkha and Nārada (pp. 195-196 vv. 25-27) on starting the treatment of reunited coparceners say:

Among brothers, if any one dies sonless or becomes an ascetic, the rest (of the brothers) should divide his wealth (among themselves) except the *strīdhana* (of his wife). They should provide for the maintenance of his wives up till the end of their lives if they keep (unsullied) the bed

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1. The view of Nīlakaṇṭha would be different as according to him among parents, the father comes before the mother.

* P. 151 (text).

of their husband, but if they be otherwise they should cut off (the maintenance). It is enjoined that she who is his daughter is to be maintained out of her father's share; she takes the share (of her father) till her marriage; after that (marriage) her husband should maintain her.[1]

Just as in the (Vedic) text ' If after a man has set apart rice for offering (in *dars'a isti*) the moon were to rise in the east, he should divide the husked grains of rice (set apart for the iṣṭi) into three classes ' (Tai. Saṁ II. 5. 4. 1--2) the* actual setting apart of the rice is not intended to be prescribed (as a condition for undergoing the prāyas'citta for the unexpected moonrise), since another text (S'atapatha--brāhmaṇa XI. I. 4. 1) ' if (the moon) rises when the (rice for the) offering (is not set apart)' it is understood that preparations for the offering (are meant to be the condition), so in the above passage (from Nārada and S'aṅkha) from the very opening verse (of Nārada in that passage) it is understood that reunited members are the agents of the actions of dying, becoming an ascetic or dividing and therefore the word ' brothers ' is not to be taken literally (but only as illustrative).[2] As to what S'aṅkha says after starting a discussion about reunited members ' the wealth of one dying sonless goes to the brothers, on failure of them the parents take it or the eldest wife ', that is intended, according to Madana,[3] for fixing the order (of succession) among the unreunited brothers and the rest, when a reunited coparcener dies after the death of those with whom there was reunion such as the paternal uncle, the brother's son or half brother. The same author (Madana) says that even here

1. In *Bai Mangal* v. *Bai Rukhmini* 23 Bom. 291 this last verse is quoted at p. 295 and it is said ' all text-writers appear to be agreed on this point viz. that it is only the unmarried daughters who have a legal claim for maintenance. The married daughters must seek their maintenance from the husband's family. If this provision fails and the widowed daughter returns to live with her father or brother there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs '.

2. Vide notes to V. M. pp. 277--279 for detailed explanation of this passage. Nārada has before the three verses quoted in the text a verse ' संसृष्टानां तु यो भागः ' that is, the discussion starts with reunited coparceners in general; hence the word ' brothers ' in the first of the verses quoted in the Mayūkha is not restricted to brothers only but stands for all reunited members. This is illustrated by a Vedic example. If a man through mistake makes preparations for a *darśa iṣṭi* and then it being really the 14th of the dark half the moon rises in the east, an expiatory rite is prescribed. ' *Nirvāpa* ' means ' setting aside grains, intending them for being offered to a deity '. The question arises whether the expiatory rite is to be performed only when the preparations for dars'a iṣṭi have gone so far as ' nirvāpa ' or even if they have not gone so far. The S'atapatha prescribes the expiation even if the grains have not been set apart. Hence the words ' havir niruptam ' in the Tai. Sam. are not to be taken literally.

3. Madana's view seems to be that this text lays down a special order of succession (other than the general one of wife, daughter, daughter's son &c.), when one who was reunited with an uncle, nephew or brother dies after all of them are dead.

* P. 152 (text).

(among parents) the mother takes first and then the father. 'The eldest wife ' (in the text of S'aṅkha) (takes) if she is self-restrained (i. e. chaste). In default of the wife, the sister (takes); to the same effect is Bṛhaspati (p. 381 v. 75) ;

She who is his sister is entitled to get a share therein. This is the rule in the case of one (dying) childless and also without wife and parents [1]

Some read this verse as ' she who is his daughter. ' In default of daughter and sister, the nearest sapiṇḍa (takes).

Now begins (the section on) Strīdhana.

Manu (IX. 194) says :

What was given before (nuptial) fire, what was presented on the bridal procession, what was given as a token of love, whatever is obtained (by a woman) from her brother, mother or father—these are declared to be strīdhana of six sorts.

The word ' six ' (in *ṣaḍvidham*) is meant only for excluding a lesser number [2]. Hence the word ' and the like ' in the (following) text of

1. This verse of Bṛhaspati about the sister is referred to in *Kesserbai* v. *Valabh* 4 Bom. 188 (at p. 202) and also in *Tukaram* v. *Narayan* 36 Bom. 339 (F. B.) at p. 353.

2. The idea is that the mention of six kinds does not exclude a larger number, but only emphasises that there cannot be less than six kinds of *strīdhana*. As the verse of Manu does not exclude more than six kinds of strīdhana, the verse of Yājñavalkya which after expressly naming some kinds of strīdhana employs the word ' ādya ' is not in conflict with Manu's but rather harmonizes with it. The Mit. gives the widest possible meaning to the word strīdhana, when it says on the word 'ādya ' ('and the like') in Yāj. II. 143 that the word ' ādya ' includes 'what is obtained by a woman by succession to ancestral property, by purchase, by partition, seizure (adverse possession) and finding '. The Mayūkha does not expressly state, as the Mit. does, that strīdhana has a very wide meaning but divides strīdhana for purposes of succession into two kinds, *pāribhāṣika* (technical) and *apāribhāṣika* (non-technical). The former embraces such varieties of strīdhana as adhyagni, adhyāvahanika, anvādheya &c. enumerated in the smṛti texts of Manu, Yaj., Viṣṇu and others, while the non-technical strīdhana comprehends wealth acquired from strangers or by mechanical arts or by her own labour or in any other way. Judicial decisions have not only not followed the Mit but have very much restricted the meaning of strīdhana. In *Sheo Shankar Lal* v. *Debi Sahai* 25 All. 468 (P. C.) it was held that property inherited by a female from a female is not her strīdhana in such a sense that it passes to her strīdhana heirs in the female line to the exclusion of males and that there is no distinction between a female inheriting from a male and a female inheriting from a female under the Benares school (*Sheo Partab* v. *The Allahabad Bank* 25 All. p. 476). This means that property obtained by a female from a male or female is not strīdhana. This is the law in the whole of India except in Western India. Vide also *Chotay Lall* v. *Chunno Lall* L. R. 6 I. A. ,15 at p. 32. The Privy Council in 25 All. 468 at p. 474 refer to the view of the Mayūkha which makes property inherited by a female from a female her strīdhana. Vide also 45 All. 715. In *Debi Mangal Prasad* v. *Mahadev Prasad* 39 I. A. 121(=34 All. 234) it was held that the share obtained by a mother on partition among her sons is not her *strīdhana* and on her death devolves on her husband's heirs. So the position of the Mit. as to partition also is

*Yājñavalkya (II. 143) is easily explained (or harmonized):

What was given (to a woman) by her father, mother, husband or brother, what was presented to her before the (nuptial) fire, wealth given to her on supercession and the like are enumerated as *strīdhana* (woman's *peculium*).[1]

And Viṣṇu (Dh. S. 17. 18) mentions more (varieties than six):

What was given (to a woman) by her father, mother, son and brother, what was presented to her before the (nuptial) fire, wealth given on her husband marrying (another woman), what was given by her relatives (or cognates like the maternal uncle), *s'ulka* and *anvādheyaka*[2] (these are the kinds of strīdhana).

Kātyāyana defines *adhyagni* (given before the nuptial fire) and the other kinds (of strīdhana)[3]:

What is given to women at the time of marriage before (the the nuptial) fire that is declared by the wise to be *adhyagni* strīdhana. That again which a woman obtains when she is being taken (in a procession) from her father's house (to the bridegroom's) is declared to be strīdhana of the adhyāvahanika kind[4]. Whatever is given to (a

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negatived. On the point of adverse possession there is a conflict of decisions. In *Kanhai Ram* v. *Musammat Amri* 32 All. 189 it was held following 5 I. A. p. 1 that what is acquired by a woman by adverse possession becomes her strīdhana; vide also *Krishnai* v. *Shripati* 30 Bom. 333, *Subramanian* v. *Arunachellam* 28 Mad. 1 at p. 7. But in *Lajvanti* v. *Safa Chand* 51 I. A. 171 (=5 Lahore 192) it was said 'if possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *strīdhana*, but she makes them good to her husband's estate'. This was followed in *Anant* v. *Mahadeo* 31 Bom. L. R. 628. But in 46 All. 769 and *Suraj Balli Singh* v. *Tilakdhari* 7 Patna 163 and in *Sant Baksh Singh* v. *Bhagwan* I. L. R. 6 Lucknow p. 365 at p 373 the P. C. case of *Lajwanti* v. *Safa Chand* was explained and it was held that if a widow holds property adversely it becomes her *strīdhana*. As regards property acquired by a widow from the accumulations of the income of her husband's property vide *Isri Dutt* v. *Hansbutti* 10 Cal. 325 (P. C.), *Saudamini* v. *Administrator-General of Bengal* 20 Cal. 433 (P. C.), 41 Cal. 870.

1. In *Brij Indar* v. *Ranee Janki* L. R. 5 I. A. 1 this verse of Yāj. is quoted (at p. 14) and it is said "And the words 'and the like' or 'such like' would show that the author did not intend to limit his definition to the particular kinds of property therein enumerated." Ādhivedanika is wealth given to a wife as a *solatium* when she is superseded and the husband marries another woman. It is defined by Yāj. II. 148 (quoted in the text below). Yāj. I. 73 mentions the circumstances under which alone the supersession of a wife was allowed. In *Bhugwandeen* v. *Mynabaee* 11 Moore's Indian Appeals at p. 512 it is said that the Vivāda-cintāmaṇi and Mayūkha confine strīdhana within the definitions of Manu and Kātyāyana and that they exclude the property inherited and the other acquisitions which are comprehended in the last clause of the para of the Mitākṣarā.

2. S'ulka and anvādheyaka are explained in the verses of Kātyāyana quoted below.

3. Vide notes to Kātyāyana verse 894 for the origin and development of strīdhana in Vedic times and the times of the sūtras.

4. The V. R. (p. 523) says that when the married girl is taken back from the bridegroom's house to her father's, what is given by the father-in-law and others is also *adhyāvahanika*.

* P. 153 (text).

married) woman through affection by her father-in-law or mother-in-law and what is received at the time of bowing at the feet (of elders) is *prītidatta* (gifts through affection). Whatever is obtained by a woman after her marriage from the family of her husband and also what is similarly obtained from the family of her (father's) kinsmen is said to be *anvādheya* (gift subsequent). That is declared to be *s'ulka*, which is obtained as the price (or equivalent) of household utensils, of beasts of burden, of milch cattle, of things (required) for decorating herself[1].

The meaning is that what is given in money to a bride at the time of her being given away (in marriage) when household utensils and the like are not available (or are not given in kind). Yājñavalkya (II. 148) expounds *ādhivedanika* :

He (the husband) should give to the superseded wife a sum called *ādhivedanika* which would be equal (to the expenses of his second marriage) when no strīdhana was given (by him) to her, but if any strīdhana had already been given, he (the husband) should allot to her only a part (as *ādhivedanika*).

' Ardham ' (half)—by this it is meant that (he should give) as much as would make (the strīdhana already given) equal to the expenses of the (husband's) second marriage (which supersedes the first wife). Devala says :

What has been promised (to a woman) by her husband as strīdhana must be paid to her by the sons as if it were a debt (of their father).

*Pratis'rutam (promised) i. e. to his wife. On the topic of giving property to a woman Kātyāyana states a special rule:

Strīdhana should be given to a woman by the father, the mother, the husband, the brother and kinsmen according to their means up to two thousand, except immovable property.

Madana says that wealth other than immovables may be given up to the limit of two thousand *paṇas*. Vyāsa also says :

A gift of two thousand as the maximum may be given to a woman (by a man) out of his wealth.

Here this gift is limited to two thousand (if given) every year. The same author (Madana) says that a gift if made after several years may

1. 'S'ulka' generally means 'bride price' i. e. the price paid by the bridegroom for giving the girl in marriage. Manu III. 51 prohibits the taking of s'ulka by the father of the girl for himself, but he allows (in III. 54) *śulka* being taken if it is kept apart for the girl herself. The Sm. C. and Vīr. explain it as the price of the articles which the bridegroom was in the habit of presenting to his bride at the time of marriage or when he started a home. Vide notes to Kat. v. 898.

* P. 154 (text)

exceed this (*limit of two thousand*) and in case of ability even immovable property may be given.

In property given to a woman in fraud of one's coparceners and in ornaments and the like given to her merely for wearing a woman has no ownership as said by Kātyāyana :

What was given (to a woman) with a fraudulent intent or in virtue of some (special) occasion (such as a festival or marriage) either by the father, the brother or the husband is not declared to be strīdhana.[1]

The same author (Kātyāyana) says that property earned by mechanical arts and also what is obtained from friends and the like other than the father and the rest do not become strīdhana (a woman's peculiar property).

Whatever is earned (by a woman) by means of the mechanical arts *or is acquired (by her) through affection from a stranger (one other* than the father, brother, husband &c.)—in that the husband has ownership, but the rest is declared to be strīdhana [2].

As for the text

A wife, a son, a slave—all these are without property. Whatever wealth they acquire belongs to him to whom they belong [3]

*that also has reference to wealth acquired by mechanical arts and the like[4]. It is more proper to say that (this verse) is intended to lay down that a woman has no absolute dominion over even *ādhivedanika* and other (species of *strīdhana*). It is hence that Manu (9. 199) says :

Women should not make expenditure from the property of the family which is common to many (members of the family) nor even from their own wealth without the permission of their husband.

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1. Some read 'sopādhi'. With this reading the meaning is 'what is given on condition' (viz. it is to be worn only on certain occasions -like festivals) and 'yogavas'ena' may also mean 'what is given by means of a deceitful trick.' In *Kurnaram* v. *Himbhay* (1879) P. J. p. 8 it is said 'if there be an actual and complete gift without fraud the ornaments belong solely to the wife. If given only in the sense of being placed in her charge for use on extraordinary occasions they remain the property of the husband. Wearing the ornaments at festivals affords a ground of inference in favour of husband's ownership only if there is no wearing of them on other occasions. The inference is in no case conclusive. Possession being prima facie proof of ownership, when wife has ornaments, the burden is on him who questions her ownership '.

2. This verse is quoted in *Muthu Ramkrishna* v. *Marimuthu Goundan* 38 Mad. 1036 (at p. 1040) and it was said that 'all the texts recognise the wife's ownership in the property acquired by her labour. They only restrict her right of alienation and make it subject to the wishes of the husband.'

3. This is Manu 8. 416 and Mahābhārata Udyogaparva 33. 64.

4. This is the view of the Sm. C. and Vir. Nīlakaṇṭha appears to prefer the view that women have no independent power of disposal (when their husbands are living) over even such strīdhana as *ādhivedanika* (and therefore also over what is acquired by mechanical arts and gifts from strangers).

* P. 155 (text).

Nirhāra means 'expenditure'[1]

In a certain kind of property Kātyāyana declares the absolute dominion (of woman).

That is known to be **saudāyika** which is obtained by a woman whether married or a maiden in her husband's or father's house from her brother or parents[2]. On obtaining wealth of the saudāyika kind it is held (lit. desired) that women have independent dominion (over it), since it was given by them (by the kindred) as a support in order that they may not be reduced to a terrible (or wretched) condition. It has been declared that women always have independent dominion over **saudāyika** as regards sale or gift at their pleasure and even as regards immovables[3].

But over immovable property given by her husband she has no absolute dominion as said by Nārada:

Whatever was given by a loving husband to a woman, she may enjoy as she pleases when he is dead or she may give it away excepting immovable property[4].

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1. In *Lakshman* v. *Satyabhamabai* 2 Bom. at p. 512. (foot-note 7) it is said that it is better to translate 'nirhāra' by 'hoard' than as 'expenditure'.

2. 'Sārdham' is a bad reading. Read 'vāpi' instead. *Saudāyika* is a technical word used in a peculiar sense by Kāt. It is derived from 'sudāya' and comprehends several kinds of strīdhana property. It is specially coined for saying that over *saudāyika* a woman has absolute power of disposal even during her husband's life-time. It is wealth which a woman receives from her parents, brothers and their relations (but not from the husband or his relations). This is the interpretation of Sm. C. and V. R. (p. 511), but the Dāyabhāga reads 'bhartuḥ sakās'āt' and thus includes husband's gifts also under *saudāyika*. In *Muthukaruppa* v. *Selathammal* 39 Mad. 298 Kātyāyana's definition of saudāyika is translated (at p. 300), the varying views of Sm. C., Par. M. and Saras. are set out and it is held that a gift by the father of immovable property to his daughter before marriage was saudāyika and at her absolute disposal. In *Venkaraddi* v. *Hanamanta Gowda* 34 Bom. L. R. 1144 Kātyāyana's verses on *saudāyika* are quoted and it is held that property bequeathed to a woman by her maternal grandfather is her *saudāyika* strīdhana which she is competent to alienate without the consent of her husband.

3. These two verses are quoted in 1 Mad. H. C. R. 85 at p. 90 (foot-note). *Bhagirthibai* v. *Kahnujirao* 11 Bom. 285 (F. B.) refers to Kāt. on *saudāyika* (at p. 302). In *Bhau* v. *Raghunath* I. L. R. 30 Bom. 229 these two verses and the definition of *saudāyika* are quoted (on p. 238) and it is held that except at to the kind known as *saudāyika* a woman's power of disposal over her strīdhana is during coverture subject to her husband's consent and that she cannot dispose of such strīdhana (other than saudāyika) by will where the husband survives her and is not shown to have assented to the will. Vide *Bhagavanlal* v. *Bai Divali* 27 Bom. L. R. 633, where 30 Bom. 229 was distinguished. In *Nathubhai* v. *Javher* I. L. R. 1 Bom. 121 the last of the three verses of Kāt. is relied on (at p. 123) for the proposition that a Hindu female is not on account of her sex absolutely disqualified from entering into a contract.

4. *This verse is quoted in Venkata Ram Rau v. Venkata Surya Rau 1 Mad* 281 at p. 287 and in 25 All. 351 at p. 353 (where it was held that in immovable property given or devised by husband to a wife she has no power of alienation unless expressly conferred.) Vide also *Hirabai* v. *Lakshmibai* 11 Bom. 573. In *Damodar* v. *Purmanandas*

The same author declares the non-exsitence of dominion in the husband and others over *strīdhana* :

Neither the husband, nor the son, nor the father, nor the brothers have authority over *strīdhana* for taking it or giving it away. If any-one of these consumes by force woman's property he should be made to restore it with interest and shall also incur a fine.[1] If *such a person were to consume it amicably after securing her consent, he would be made to restore the principal only, when he becomes well-off (able to pay).

Manu (VIII. 29 and IX. 200) says :

On such [2] of their kinsmen as seize the wealth (of women) while they (the women) are alive a righteous king should inflict the punishment meted out to a thief. The heirs of the husband should not divide (among them-selves) the ornaments worn by women during the lifetime of their husband. If they divide them, they become degraded (sinful).

Dhṛtaḥ means ' what was given to her by the husband and the like and was worn by her. ' Devala says :

Maintenance (what was given for maintenance), ornaments, *s'ulka* (bride price) and the profits of money-lending are her strīdhana. She alone is entitled to enjoy it and the husband is not entitled (to enjoy it) except in the case of distress. In the case of idle expenditure or consumption of it (the husband) should repay it with interest, but he may use the strīdhana (of his wife) for relieving the distress of his son.

Vṛtti means ' wealth given by the father and the like for her main-tenance '. *Lābhaḥ*[3] means ' interest '. *Mokṣa* means ' expenditure i. e. gift. ' The word ' son ' (is illustrative and) implies the whole family.

Yājñavalkya(II. 147) says :

The husband is not liable to return, if he is unwilling, the property of his wife taken (by him) in a famine, for indispensable religious

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7 Bom. 155 at pp. 164--165 this verse was relied upon for the proposition that a widow has absolute control over movables given by the husband or inherited by her. In *Seth Mul-chand* v. *Bai Mancha* 7 Bom. 491 it was held that an absolute bequest by a Hindu of his separate immovable property to his widow confers on her as full dominion and power of alienation over that property as if the bequest had been made to a stranger and that the passage of Nārada had reference probably to a stage of progress in which the severance of an estate from the family was still looked on as impossible or at least as sacrilegious.

1. This verse is quoted in *Nathubhai* v. *Javher* 1 Bom. 121 at p. 123. The three verses are ascribed to Kātyāyana in most digests.

2. This verse is quoted in *Nathubhai* v. *Javher* 1 Bom. 121 at p. 123.

3. ' Lābha ' is variously explained. Sm. C. and Vir. say that it means what is given to a woman when observing a vrata (such as one for securing the favour of Pārvatī); while V. R. explains it as ' what is received from relatives '. ' Idle expenditure ' means ' spend-ing in gambling ' or on ' nautch parties ' &c. This verse of Yāj. is quoted in *Nammalwar* v. *Perundevi* 50 Mad. 941 at pp. 944 and 946, where ' taken ' is said to mean not merely physical taking but 'taking and using ' and that if husband does not use, then the wife still remains the owner.

* P. 156 (text),

acts, in disease, or while under imprisonment (by a creditor or by the king or by an enemy).

Here from the express mention of the husband it is (as good as) declared that one other than the husband should not take a woman's property even in such distress as a famine and the like. 'Dharmakāryam' (religious act) means 'an indispensable one'. 'Sampratirodhake' means 'in prison'. Devala says that in certain cases (the husband) has to return (strīdhana used by him) even if he be unwilling:

If the husband has two wives and he does not honour (reside with) her, he should be forcibly made (by the king) to return (the strīdhana of the ill-treated wife) even if she bestowed it upon him through affection. *Where food, raiment and residence are withheld from a woman (by her husband) she may exact (or demand) her own property (from the husband or his family) and the share (of the husband) from his coparceners.

'Rikthinaḥ' means 'from the coparcener'. This text refers to a chaste wife; but an unchaste wife does not deserve a share. And to the same effect the same author says:

A wife who does acts injurious (to her husband), who is immodest, who wastes property and who is given to adultery is not entitled to any wealth (of her husband[1]).

The same author says:[2]

Wealth was produced for sacrifices; therefore one should employ it on religious objects and not spend it on women, fools and irreligious people.

Manu (IX. 195) thus declares the order of heirs, after a woman's death, in taking her (strīdhana) wealth called *anvādheya*[3] (gift subsequent) :

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1. This verse is also ascribed to Kātyāyana. If we read 'strīdhanam' as one word as done in the text the meaning according to the Sm. C. is 'she is not entitled to use even her own strīdhana according to her own wishes'. From the context it seems better to separate as strī and dhanam.

2. This verse is quoted in the Mit. which does not accept the position that all wealth is intended for sacrifices. Vide notes to V. M. pp. 287--288 for discussion of the position of the Mit.

3. The Mayūkha differs from the Mit. in prescribing several different modes of succession to several kinds of strīdhana. The Mit. prescribes one mode for all kinds of strīdhana except s'ulka. The Mayūkha prescribes four different modes viz. (1) for *anvādheya* and husband's gift of affection, (2) for s'ulka, (3) for technical strīdhana other than that in 1 and 2, and (4) for non-technical strīdhana. According to the Mit. this verse of Manu does not lay down a special rule (a *vidhi*) not found elsewhere but is only a re-iteration (*anuvāda*) of what is already well-known, viz. that when a woman has several daughters (who will therefore be full sisters) they succeed to their mother's strīdhana (and sons do not take at all), but when there are no daughters at all then sons succeed to their mother's strīdhana together. Others like the Dāyabhāga, the Sm. C., the V. R., the Vir. hold that this text of Manu contains a special rule that daughters and sons succeed together to the *anvādheya* strīdhana and to husband's gifts

* P. 157 (text).

Anvādheya wealth and what was given to her by her husband through affection shall belong to her children, if she dies while her husband is alive. The same author (Manu IX. 192) particularises what is meant by *prajā* (children):

When the mother is dead, all the full brothers (sons of the woman deceased) as well as the full sisters should equally divide the maternal wealth.

The meaning (comment) of the Mitākṣarā (on this passage) is:—where owing to the non-existence of daughters it follows that sons become entitled together (to their mother's *strīdhana*), there they take together [1] (and divide equally); but *where it is only the daughters that are entitled to succeed, there they take together—this is merely what is repeated (by this text of Manu); but it does not lay down a special precept as to sons and daughters taking together (as heirs), which (rule) is unknown (from any other text). But others (writers) say that (this text) lays down a special rule not known from any other source, viz. that sons and daughters succeed together as regards *anvādheya* and husband's gifts of affection.

Manu declares[1] a special rule about sisters:

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of affection. From the way in which the two views are set forth and comparing this with the way in which the Mayūkha sets forth two views with the words 'pare tu' (as above p. 749 n 1) it is clear that Nīlakaṇṭha favoured the latter view. In *Sitabai* v. *Vasantrao* 8 Bom. L. R. 201 the whole of the passage of the Mayūkha commencing with Manu IX. 195 up to the text of Kātyāyana 'sisters having husbands should share with brothers' (Mandlik's translation p. 95 l. 17 to p. 96 l. 2) is quoted, it is held that *anvādheya* extends to gifts from parents as well as from husband, that *saudāyika* is not used in contradistinction to *anvādheya* in connection with succession, that property given by a will becomes anvādheya though wills were unknown to the Mayūkha and that sons and daughters equally succeed to a woman's *anvādheya*. In *Dayaldas* v. *Savitribai* 34 Bom. 385 the words 'others say &c.' are quoted at p. 390 and it was held that where a Hindu female governed by the Mayūkha law died leaving property which she had inherited from her father under a gift after marriage and left daughters and a son, the property should be divided equally between them all, the unmarried daughters having preference over married ones. In *Ganga* v. *Ghasita* 1 All. 46 (F. B.) it was held that unchastity does not incapacitate a daughter from succeeding to strīdhana. This was followed in 30 Cal. 521. Vide *Hiralal* v. *Tripura Charan* 40 Cal. 650 (F. B.) where it was held that mere leading a life of a prostitute did not sever the tie of blood and so a prostitute's property in the absence o nearer heirs passes to her brother's son. In *Tara* v. *Krishna* 31 Bom. 495 a *murali* who leads the life of a prostitute and has children was held not to be a *kanyā* and was held entitled to succeed after all married and unmarried daughters. In *Jaya* v. *Manjanath* 19 Bom. L. R. 820 it was held that property left by a *naikin* descends to her daughter in preference to her son. Vide 1 Cal. 275 for succession to anvādheya under Dāyabhāga.

1. This verse is ascribed to Bṛhaspati by other digests and Nīlakaṇṭha also seems to do the same lower down (text p. 160).

* P. 158 (text)

Strīdhana goes to (the woman's) children, and the daughter is a sharer therein, if she be not given away (in marriage); but (a daughter) if married receives only (a little) in token of regard (for her).

'*Tadaṁs'inī*' (in the verse) means 'she is entitled to a share equal to that of the son; '*apratiā*' (not given away) means 'not married.' The meaning is that when she (an unmarried daughter) exists, the married one gets only a token of regard i. e. only some trifle. In the absence of unmarried daughters, married ones get a share equal to that of their brother, since Kātyāyana says:

Sisters having husbands should share with their brothers.

Something should be given to the daughter's daughters also, since Manu (IX.193) says :—

Even[1] to the daughters of them (the daughters) something should be given according to their deserts from their grandmother's estate, if there be affection.

The *yautaka* (kind of *strīdhana*) goes to the unmarried daughters alone and not to the sons. To the same effect is the same author (Manu IX.131) ;

Whatever is the *yautaka* (wealth) of the mother is the portion of the unmarried daughter alone.

According to Madana *yautaka* is that which is obtained by a woman at the time of marriage or other (ceremony) when seated with her husband on one seat, since the Nighaṇṭu[2] says that *yautaka* is (what is acquired) when the two (husband and wife) are joined together.

*As regards the aforesaid technical *strīdhana* other than *anvādheya* and the affectionate gifts of the husband, Gautama states a special rule: *strīdhana* goes to daughters unmarried and indigent.[3]

1. In *Sham Bihari Lal* v. *Ram Kali* 45 All. 715, a daughter's daughter was held to be nearer heir to strīdhana than a son's son. In *Ram Kali* v. *Gopal Devi* 48 All. 648 daughter's daughters were held entitled to succeed to the *strīdhana* of their grandmother irrespective of the question whether they were married or unmarried, which latter consideratian was held applicable to daughters only. In *Amarjit Upadhiya* v. *Algu* 51 All. 478 the daughter's daughter was preferred to the daughter's son as heir to *strīdhana*.

2. Vide p. 85 n 2 above as to Nighaṇṭu.

3. The heirs to the technical strīdhana (other than *anvādheya* and husband's gifts of affection) are, first unmarried daughters (to the exclusion of married daughters) ; then married daughters, among whom the indigent exclude those who are well to-do. In *Totava* v. *Basava* I. L. R. 23 Bom. 229 it has been held that courts ought not to go minutely into questions of comparative poverty, but that where the difference is marked, the poorest daughter takes the whole property. Vide *Manki* v. *Kundan* 47 All. 403 also.

* P. 159 (text)

' Apratiṣṭhitāḥ ' (in Gautama) means ' devoid of wealth ' (indigent).

The daughter of a brāhmaṇī wife however takes the wealth even of her step-mother,[1] as Manu says (IX.198) :—

> The wealth of a woman that may have been given to her by her father in any way shall be taken by the brāhmaṇī daughter or it may belong to her offspring.

The word ' vā ' (or) is (here) used in the sense of ' and ' and therefore it follows (that she takes) by dividing (with the issue of the kṣatriya or vais'ya co-wife). Some say that the word ' brāhmaṇī ' is illustrative of any daughter of equal or superior caste, but the authority for this (view) is doubtful.[2]

In default of daughters, the issue of daughters succeed, since Nārada p. 189. v. 2) says :—

> The daughters (take the wealth) of the mother; in the absence of daughters, the issue.

The allotment of shares in the case of daughters sprung from different mothers or daughter's sons (sprung from different mothers) is according to the rule laid down in ' in the case of sons of different fathers the allotment of shares is according to the fathers[3] (Yāj. II. 120).' As for the text of Yājñavalkya (II. 117) ' the daughters share the residue of their mother's property after (the payment of her) debts and in default of them, the issue,' there also, according to some, the word ' anvaya ' (issue) means ' the issue of the daughter '. But others say that in default of daughters, the sons alone

1. Kullūka explains that where a brāhmaṇa has wives of different castes, then if his wife of the kṣatriya or vais'ya caste receives wealth from her father and dies, then the brāhmaṇa's daughter born of his brāhmaṇi wife would solely succeed to the strīdhana of her step-mother even if the latter has her own daughter or son and that the kṣatriya wife's children would succeed only if the daughter of the brāhmaṇī co-wife be dead. Nīlakaṇṭha twists the meaning and takes ' va ' (or) in the sense of ' and ' and says that the issue of a brāhmaṇī co-wife would succeed equally with the issue of the kṣatriya wife.

2. The view of some writers was that if a kṣatriya had several wives of the same caste or one wife of the kṣatriya caste and another of the vais'ya caste, then the daughter of the kṣatriya wife would take the strīdhana wealth of other wives of the same caste or the *strīdhana* of the wife of the vais'ya caste, even though the vais'ya wife had a child of her own. Vide notes to V. M. pp. 294-295. The Mit. countenanced the view that the daughter of a kṣatriya co-wife would take the strīdhana of a vais'ya co-wife if the vais'ya co-wife died without issue. Nīlakaṇṭha does not accept this. According to him, Manu's rule is strictly restricted to the daughter of a brāhamaṇī and in other cases the strīdhana would go to the husband if the woman died without children or to her own children if any.

3. If there is no daughter, but there are grand-daughters born of different daughters or if there be no daughter or daughter's daughters but only daughter's sons then the estate will be divided into as many shares as there are daughters and the children of one daughter will together take the share that would have fallen to that daughter i. e. the division is *per stirpes* and not *per capita*.

take, since in the text of Nārada (cited above) it is the mother alone that is pointed out by the pronoun ' tat '.[1] This view is in agreement with (every day) usage. The words 's'eṣam-ṛṇāt' mean, according to men conversant with traditional usage, that the sons alone should take (the mother's property) when it is equal to or less than the debt (due by the mother).

In the absence of the daughter and the rest, the sons, grandsons and the like should take, since Kātyāyana says :—

But on failure of daughters, her *wealth becomes the inheritance of the sons.

This (superior) right (of inheritance) of daughters and the rest in the mother's estate exists only in respect of the technical *strīdhana* previously enumerated in the words ' *adhyagni* ' (Manu IX. 194); for if it (superior right of inheritance) related to all wealth whatever in which the mother has ownership, then the technical terms (*adhyagni, adhyāvahanika* &c.) would be purposeless.[2] Therefore (it follows)that the texts above quoted containing the word ' strīdhana ' from Bṛhaspati, Gautama and others such as ' *strīdhana* shall belong to the children (of a woman)', ' strīdhana goes to the daughters, ' have reference only to strīdhana technically so called. Those texts again which, though they do not contain the term strīdhana, have the same

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1. In the text of Nārada ' tadanvayaḥ ' occurs and in Yāj. (II. 117) also ' anvayaḥ ' occurs and the question is : whose issue is meant. The Mit. explains Yāj. by connecting ' anvayaḥ ' with ' mātuh ', Aparārka and Sm. C. connect it with ' daughter '. The Dāyabhāga takes it in the same way as the Mit. does. Nīlakaṇṭha follows the Mit. and the Dāyabhāga. Vide notes to V. M. p. 206. ' Sāmpradāyikāḥ ' means ' men conversant with or following *sampradāya* (traditional usage).' This refers to the Mit. The rule of dharmas'āstra was that sons and grandsons were to pay off the debts of their father and mother. Vide Yāj. II. 50. The view ascribed to sāmpradāyikas is referred to in *Madhavrao* v. *Ambabai* 26 Bom. L. R. 1210 at p. 1216.

2. ' Purposeless — No purpose would be served by separately defining *adhyagni* and the other kinds of *strīdhana*. The words ' in the absence of daughters .... purposeless' are quoted in *Manilal Rewadat* v. *Bai Rewa* 17 Bom. 758 at p. 762 (foot-note). In this case a wife sued her husband at Ahmedabad for maintenance, got a decree for maintenance and for arrears and then died. The question was : who was to be her representative in appeal, her daughter or husband, as the money was not technical strīdhana. Telang J. elaborately criticized the dicta of West J. in *Vijiarangam* v. *Lakshuman* 8 Bom. H. C. R. (O. C. J.) 244 at p. 260 and Mr. Mayne's remarks in his work on Hindu Law and showed that both were wrong. Telang J. concludes ' As regards that property which does not class as woman's property in the technical sense the sons and the rest take precedence over the daughters and the rest' (p. 768) and that ' the heirs to *strīdhana* proper and strīdhana improper are identical, save that as between male and female offspring the latter have a preferential right as regards strīdhana proper, while the former have a similar right as to *strīdhana* improper. ' At p. 766 Telang J. remarks that ' sons and the rest ' means sons, grandsons, great-grandsons and no more. Vide also *Bhagirthibai* v. *Kahnujirao* 11 Bom. 285 (F. B.) at p. 310 for the significance of ' sons and the rest. '

* P. 160 (text).

purport (as the texts of Bṛhaspati and Gautama which contain the term strīdhana) such as 'they should divide the maternal wealth' (Manu IX. 192) have also reference to the same (viz. technical kinds of strīdhana), since there is brevity in assuming that all the texts have one basis (or origin).[1] As for the dictum of Yājñavalkya (II. 117) 'sons should divide equally, after the death of the parents, the heritage as well as the debts,' it refers to what is acquired by partition or cutting (sewing) and the like and is other than the technical kinds (of strīdhana). Therefore the sons and the rest alone should take the mother's wealth other than the technical one, even when there are daughters.[2]

On failure,[3] however, of both kinds of issue, Yājñavalkya (II. 144) states a special rule with regard to technical strīdhana :

Her kinsmen (bāndhavāḥ) should take it, when she dies without issue.

The same author (Yāj. II. 145) sets forth the succession of kinsmen according to the difference in the form of marriage :

The property of a childless woman (married) in the four forms beginning with *brāhma* goes to her husband; in the remaining (four forms) it goes to her parents; if she has given birth (to children) it goes to the daughters.

* In default of the husband, (the person) nearest to her in the husband's family takes (the strīdhana) and in default of the father, (the person) nearest to her in the father's family takes (when marriage is in any

1. 'All the texts &c.'— All texts having the same purport, though some of them may not contain the word *strīdhana*, should be understood as referring to technical strīdhana.

2. The words 'As for the dictum .... daughters' are quoted in *Manilal Rewadat* v. *Bai Rewa* 17 Bom. 758 at p. 762 (foot-note) and the sentence 'therefore the sons......... daughters' is quoted in *Bhagirthibai* v. *Kahnujirao* 11 Bom. 285 (F. B.) at p. 310. In *Bai Narmada* v. *Bhagawantrai* 12 Bom. 505 (a Gujarat case) it was held that, where a woman got in gift from a stranger a house and also some money, her widowed daughter-in-law succeeded in preference to her deceased daughter's daughter. In *Jankibai* v. *Sundra* 14 Bom. 612 (a case from Ratnagiri where the Mit. is supreme) it was held after quoting this passage of the Mayūkha that it did not apply and that the daughter would succeed in preference to the son where a woman inherited certain property from her father. In *Bai Raman* v. *Jagjivandas* 41 Bom. 618 the passage beginning with 'As for the dictum &c.' is quoted (at p. 623) and it is held that non-technical strīdhana descends under the Mayūkha to a son in priority to a deceased son's son.

3. The whole of the passage from this sentence to the verses of Manu (IX. 196--197) is quoted in *Moosa Haji* v. *Haji Abdul* 30 Bom. 197 at pp. 201--202. 'When she dies without issue--' this means 'without daughters, daughter's daughters or sons, grandsons or great-grandsons'; 'in the four forms' -eight forms of marriage were recognised by Manu III. 21, Gautama IV. 4--11, Kauṭ. p. 151 and Baud Dh. S. I. 11. 1--9. They are brāhma, daiva ārṣa, prājāpatya, āsura, gāndharva, rākṣasa and pais'āca. Manu (III.24) and Baudhāyana say that the first four are the approved forms for brāhmaṇas, while Gautama (IV. 12) says in general that the first four are approved ones.

* P. 161 (text).

*Here (in this passage) the absence of the daughter and the daughter's daughter is to be understood, since the son of the body and the daughter's son are entitled to take (strīdhana) only in default of them.

In respect of property given by *bandhus* (cognate kindred) in *āsura* and other (unapproved) forms of marriage Kātyāyana says :

That which was given (to a women) by her *bandhus* goes on failure of the bandhus to her son.[1]

As to s'ulka, however, Gautama (says) ; the sisters s'ulka belongs to her full brothers and afterwards to her mother.[2]

As to what S'aṅkha says 'the s'ulka belong's to the bridegroom himself,' that must be understood (to relate) to a woman who dies before (the actual) marriage. Here Yājñvalkya (II. 146) states a special rule :

If she dies (after betrothal), the gifts (given to her) should be taken (by the bridegroom) after deducting the expenses of both sides (therefrom).

The meaning is : the husband (the bridegroom) may take (back) if the (betrothed) girl dies the s'ulka already given by him to her that remains after (deducting therefrom) the expenses incurred by himself and by her father. Baudhāyana states a special rule as to certain matters :

Shrimant Shahajirao 17 Bom. 114 at p. 123 it was held that the list does not state the order of succession as between the heirs enumerated. In *Bai Kessarbai* v. *Hunsraj* 30 Bom. 431 (P. C.) this text is construed as not laying down any order of succession and it is said that the list is not exhaustive and that its true construction is that it should be taken distributively viz. the husband's relations will succeed if the marriage is in an approved form and the father's, if in an unapproved form. At p. 444 Bṛhaspati is quoted and at pp. 446-451 three constructions are discussed. In that case a co-widow was preferred to husband's brother or his brother's son. Vide *Sundaram* v. *Ramsanna* 43 Mad. 32 at p. 36 for a discussion of Bṛhaspati's text (which was held not applicable to a maiden). ' The son of the body &c. '— the *aurasa* son and daughter's son are expressly mentioned by Bṛhaspati, but the daughter and daughter's daughter are not mentioned ; yet they are to be implied in this passage, as the son himself comes after the daughter and daughter's daughter as an heir to strīdhana.

1. The Dāyabhāga, Vīr., Sm. C. read ' goes to her husband ' and the Dāyabhāga says that this text applies to s'ulka. The Sm. C. takes the words to apply to the strīdhana of a woman married in a form other than the five mentioned by Manu (IX. 196).

2. This sūtra is differently interpreted by different writers. The Mit., Sm. C., Par. M., Vir. interpret as above. Haradatta (on Gautama) says that full brothers take it after the mother i. e. the mother takes first. V. R. follows Haradatta. S'ulka is explained by Kātyāyana above (178).

* P. 162 (text).

The wealth[1] of a deceased maiden may be taken equally by her full brothers, on failure of them, it belongs to her mother and in default of her, it belongs to the father.

Those conversant[2] with traditional usage say that this (text) relates to ornaments and the like presented by the maternal grandfather and the like at the time of betrothal to a girl who dies before (the actual celebration of) marriage.

Now (begins) the treatment of those who are excluded from a share (or inheritance).

Yāj. (II. 140) says :

An impotent person, a *patita* (one who is an outcast for some grave sin) and one born of him, a lame man, a mad man, an idiot, a blind man and one afflicted with an incurable disease are not entitled to a share and are to be maintained (only).[3]

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1. This is referred to in *Gandhi Maganlal* v. *Bai Jadab* 24 Bom. 192 (F. B.) = 1 Bom. L. R. 574 where a paternal grandmother inheriting from her maiden granddaughter was held to have taken the estate absolutely which she could dispose of by will. In *Janglūbai* v. *Jetha* 32 Bom. 409 the text of Baudhāyana is quoted at p. 411 and it was held that to the wealth of a maiden of the Kamathi class in Poona her father's mother's sister was a preferential heir to the maiden's maternal grandmother. In *Tukaram* v. *Narayan* 36 Bom. 339 (F. B.) the father's sister was held to be a preferential heir of a maiden to the male gotraja sapindas of her father five or six degrees removed. The principle is that the nearest heir of the father is the heir of the maiden. Vide *Kamalabai* v. *Bhagirthibai* 38 Mad. 45, *Sundaram* v. *Ramasamia* 43 Mad. 32, *Dwarkanath* v. *Saratchandra* 39 Cal. 319.

2. 'Those conversant with &c.' -- This refers to the Mit., 'betrothal' --the original word is 'vāgdāna' which literally means 'gift by words'.

3. Act XII of 1928 abrogates all grounds of exclusion from inheritance except lunacy and idiocy from birth. The act, however, does not apply to those cases which are governed by the Dāyabhāga. In numerous reported cases this text of Yāj. and the texts of Manu and other sages have been quoted and interpreted, but in view of the recent legislation referred to above, it is not necessary to go into them in great detail. Besides act XXI of 1850 (Caste Disabilities Removal Act) had already abrogated the ancient Hindu Law as to loss of rights to property or rights of inheritance by reason of a man's renouncing his religion or by reason of his being deprived of caste for breaches of rules observed by the caste in which he was born. Vide *Gangaram* v. *Ballia P. J.* for 1876 p. 31 where the V. M. is referred to (at p 32) as to an outcast. Vide also *Murarji* v. *Parvatibai* I Bom. 177 at pp. 179--180 (where both Yāj. and Manu are quoted). 'A patita' --Vide *Gangu* v. *Chandrabhagabai* 32 Bom. 275 as to a murderer being disqualified to inherit to the person murdered by him (at pp 280--281 texts and the Mayūkha about wives of murderers) and *Kenchava* v. *Girimallappa* 48 Bom. 569 P. C. = 51 I.A. 367 (where 32 Bom. 275 was distinguished). The degradation of a daughter on account of incontinence does not put an end to her right to inherit the *strīdhana* property of her mother, as held in *Angammal* v. *Venkata* 26 Mad. 509 (512) and in *Ram Perqash* v. *Mussammat Dahan Bibi* 3 Patna 152 (at p. 178) it was held that conversion to Mahomedanism before the succession opened did not cause

*' *Tajjaḥ*' (in Yāj.) means ' born of him who is *patita* (an outcast) '. Those that become endowed, after partition, with virility and the like (the absence of which led to exclusion) by means of medicaments and the like, do take a share like (i. e. on the analogy of) a son born after partition[1]. Manu says (IX. 201) :

> The impotent and the outcast (*patita*) are not entitled to a share and so are persons born blind and deaf; also a lunatic, an idiot, one dumb and such as are destitute of (the use of) a limb (or sense).[2] ' Nirindriyāḥ '

loss of right by virtue of Act XXI of 1850. Vas. 13. 51 says that the progeny of one who is *patita* becomes *patita* (except female children). ' A lame man ' --In *Venkata Subba Rao* v. *Purushottam* 26 Mad. 133 it was held that lameness which was not congenital could not be a bar to the right of inheritance and a doubt is expressed whether even congenital lameness would be a bar. ' A mad man ' —In 12 All. 530 it was laid down that the rule disqualifying persons as idiots or mad men should be enforced only on the clearest and most satisfactory proof and does not disqualify persons who are merely of weak intellect i. e. are not up to the average standard of human intelligence. In *Murarji* v. *Parvatibai* 1 Bom. 177 there is an *obiter dictum of* Westropp C. J. that insanity in order to operate as a ground of exclusion must be congenital, like blindness but this dictum is dissented from in *Bapuji* v. *Dattu* 47 Bom. 707; vide also *Muthusami* v. *Meenammal* 43 Mad. 464 where all texts and authorities are considered. Insanity whether curable or incurable excludes from inheritance; vide 5 All. 509 (F. B.). ' A blind man ' —In *Umabai* v. *Bhavu* 1 Bom. 557 it was held that incurable blindness, if not congenital, does not lead to exclusion. The same was held by the P. C. in *Gunjeshwar* v. *Durga Prasad* 45 Cal. 17 = L. R. 44 I. A. 229 (at p. 234 the verse of Manu is quoted). In *Pudiava* v. *Pavanasa* 45 Mad. 949 (F. B.) it was held that blindness must be congenital in order to exclude from inheritance.

1. This sentence is quoted in 9 Mad. 64 (F. B.) at pp. 68 and 74 and in 43 Mad. 4 (at p. 9 the Mayūkha is quoted). This may apply to partition, but it cannot apply to inheritance. When property has once become vested in a person by inheritance owing to the exclusion of another on the ground of mental or bodily defect, it cannot be divested by the subsequent removal of the defect. Vide 5 All. 509 (F. B.).

2. This verse of Manu is quoted in 1 Bom. 177 at p. 179 and in *Anant* v. *Ramabai* 1 Bom. 554 (at p. 556), in the former of which (at p. 186) ' nirindriya ' is explained. In 43 Mad. 4 (at p. 12) that word was explained on the analogy of the Vedic passage '*tasmāt striyo nirindriyāḥ*' as meaning ' devoid of sufficient capacity and mental strength in the organs of sense.' ' One dumb '— In *Bharmappa* v. *Ujjangauda* 46 Bom. 455 it was held that a person suffering from congenital and incurable dumbness was excluded from inheritance (at p. 457 the Mayūkha is referred to). Vide also *Savitribai* v. *Bhaubhat* 29 Bom. L. R. 64 (at p. 66 Mayūkha is referred to) and *Pratapgavari* v. *Mulshankar* 26 Bom. L. R. 269 (where it was held that dumbness in order to bar must be incurable, though not necessarily congenital). In *Nagammal* v. *Sankarappa* 54 Mad. 576 at p. 585 the learned judges differ from 46 Bom. 455 and hold that where a son is suffering from an incurable and virulent form of leprosy, the father can adopt a son. ' Destitute of a limb or sense ' — In *Anant* v. *Ramabai* 1 Bom. 554 it is said (at p. 557) that the word ' nirindriya ' even in its more extended sense of the loss of a sense organ or limb could not be properly applied to leprosy and that leprosy in order to exclude must be of the sanious or ulcerous type (but need not be congenital). Vide as to leprosy *Ranchod* v. *Ajoobai* 9 Bom. L. R. 1149, *Ramabai* v. *Harnabai* 48 Bom. 363 P. C. (= 51 I. A. p.177) and 50 Cal. 604 at p. 608 (where it is said that the text of Devala quoted by the V. M. below and that of Viṣṇu are the only texts where lepers are expressly excluded).

* P. 163 (text).

(in Manu) means ' devoid of the sense of smell and the like. ' Nārada (p. 194 vv. 21-22) says:

One hostile to one's father, a *patita*, an impotent person, one who goes to another continent (from India in a vessel): these even though they be *aurasa* (sons of the body) should not get a share; how can *kṣetrāja* sons (suffering from these defects) get a share? Persons afflicted with long-standing and severely painful diseases, persons who are either idiots, insane or lame — these must be maintained by the family, but their sons are entitled to a share.

'Apayātritaḥ[1] ' according to Madana means 'one who is excommunicated by his kinsmen ' on account of his being guilty of high treason or the like by the method of breaking a water-pot or the like; but it is better to take the word to mean ' one who goes across the sea in a vessel or the like to another continent ' (than Jambudvīpa, India) for trade; because contact with such a person is prohibited in the Kali age by the text ' a twice-born person who crosses the ocean in a vessel is not to have intercourse (with his castemen) even though he be purified ' (by appropriate prāyas'cittas) and because breaking of a water jar and excommunication are not prescribed in the case of high treason. S'aṅkha— Likhita say ' inheritance, *piṇḍa* (ball of rice) and water are withheld (lit. cease) from the *apayātrita* (one who goes on a sea voyage to a distant land)'. Vasiṣṭha says (17. 52) ' those who have betaken to another order of life (other than the householder's order) are excluded from a share '. This means that the perpetual student, the forest hermit and the *yati* (are excluded from a share).[2]

1. There are numerous readings for this word, such as ' apapātrikaḥ ', ' aupapātikaḥ ', ' avapātitaḥ ' &c. Vide my notes to V. M. pp. 305--306 for these and their explanations and *Dal Singh* v. *Musammat Dini* 32 All. 155 at p. 158 where most of these are discussed. Nīlakaṇṭha is wrong in saying that breaking of a water jar is not prescribed for high treason. Gautama 20. 1-4 does prescribe ' ghaṭasphoṭa ' in such a case. Compare Manu. XI. 183--184 and Yāj. III. 295 also. The half verse a twice-born person &c. ' is quoted by Hemādri from the Ādityapurāṇa in his list of acts forbidden in the Kali age. Vide p. 104 above about secondary sons being forbidden in the Kali age. There is a sharp conflict about the meaning of ' nauyātuḥ ' which, according to strict rules of grammar, would mean ' who habitually crosses the sea in a vessel ' (and not one who makes a casual voyage). Vide my notes to V. M. p. 306. The verse of Nārada ' persons afflicted &c. ' is quoted in 1 Bom. 177 at p. 182.

2. An ordinary student (called *upakurvāṇa*) intends to become a householder and so he is not excluded. ' Yati ' means a sannyāsin, an ascetic who has given up worldly ties. In *Somasundaram* v. *Vaithilinga* 40 Mad. 846 it was held that the texts as to disinheritance applicable to *yatis* or *sannyāsins* did not apply to a s'ūdra ascetic unless a usage to that effect was established. Vide also 46 All. 616, 39 Bom. 168 at p. 174, 52 All. 789. In 54 Mad. 576 at p. 581 reliance is placed on the Mayūkha which quotes S'aṅkha-Likhita that the heritable right of him who has been formally degraded (*apapātrita* is the reading accepted) and his competence to offer oblations of food and libations of water are extinct.

Kātyāyana says :

The son of a woman married in the wrong order and one who is born of a man of the same gotra (as the man's wife) and one who is an apostate from the order of ascetics–these never obtain the inheritance.[1]

*'Sagotrāt' (in Kātyāyana) means 'one born from a woman married by one who has the same gotra as her (i.e. as her father's).' ' Akramoḍhāsutaḥ ' means according to some *kṣetraja* or *kānīna* son and the like, but it is more proper to say that when a younger daughter gets married while her elder sister is still unmarried, they both are then designated by the word ' akramoḍhā[2] '. The same author (Kātyāyana) declares that if he (the son of an *akramoḍhā*) be of the same class (*varṇa*) as his father's, he was entitled to a share :

The son of a woman married in the wrong order takes the inheritance when he belongs to the same class as his father ; and so does a son born of a woman who is not of the same class (as her husband) but who is married in the proper order.[3]

A son born of a woman who is married in the reverse order is not entitled to a share though he be procreated by the husband himself.[4] And so the same author (i. e. Kātyāyana) says :

The son of a woman married in the reverse order (of classes) is not entitled to inherit (to his father). It is the opinion (of sages) that food and raiment should be given (to such a son) till his end by his kinsmen.

When there are other sons endowed with good qualities, Manu (IX. 214) declares that the vicious son is not entitled to a share (of the inheritance);

All those brothers who are addicted to vicious acts are not entitled to the estate.[5]

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1. Vide my notes to V. M. pp. 307–308 and Kāt. verse 862 for the several explanations of this verse. A younger brother or sister marrying before an elder one was guilty of the sin of ' parivedana '. The younger one so marrying was called parivettṛ and the elder one so passed over was called ' parivitta ' or ' parivinna '. These two as well as the giver of the girl and the priest incurred grave sin. Vide Baud. Dh. S. II. 1. 39 and Manu III. 172. There is another meaning of ' akramoḍhā '. In ancient times a person was first to marry a girl of his own caste and then he could marry another of a caste lower than his own (Manu III. 12). But if a brāhmaṇa married first a kṣatriya girl and then a brāhmaṇa girl, both became ' akramoḍhā '.

2. For explanation of *kṣetraja* and *kānīna* vide p. 103 above.

3. The last half may be illustrated as follows :— if a kṣatriya first married a girl of his own class and then married a vais'ya girl, the son of the latter would take a share, as he would be born of a woman married in the proper order, though his mother is of different class from her husband's. Vide Yāj. II. 125.

4. If a kṣatriya married a brāhmaṇa girl and had a son from her, this would be the son of a *pratiloma* union and so he would not be entitled to inherit to his kṣatriya father.

5. Compare Gautama 28. 38 and Āp. Dh. S. II. 6. 14. 14—15.

* P. 164 (text).

Bṛhaspati (p. 376 vv. 42-43) says:

> Though born of a woman equal in class (to her husband) a son destitute of good qualities does not deserve the paternal wealth; it is ordained that it (paternal wealth) belongs to those (sons) who are learned in the Vedas and who offer *piṇḍas* to the deceased. A son rescues his father from highest and lowest debts; hence no purpose (use) is served by a son who is the reverse of this.[1]

These persons excluded from a share (or inheritance) must be maintained during their life by those who take the inheritance; since Manu (IX. 202) says:

> But it is just that the wise should give, according to their ability, food and raiment till the end (of their lives) even to all (who are excluded); for he who does not give (these) would become *patita* (sinful and outcast).

*' Atyantam ' (in Manu) means ' as long as they (excluded ones) live '. And to the same effect is the text of Yājñavalkya (II. 140) cited already ' they are not entitled to a share and are to be maintained '. But those who have betaken themselves to another order (other than that of householder), those who are outcasts and the sons of outcasts are not entitled to be maintained. And to the same effect is Vasiṣṭha (17. 52-54) ' persons who have entered into another order (ās'rama) are not entitled to a share; and so are not entitled the impotent, the lunatic and the *patita* (outcast); maintenance (must be given) to the impotent and the lunatic.' Here the express mention of two as regards maintenance serves to exclude the other two.[2] Devala says:

> [3]When the father is dead, the impotent, the leper, the lunatic, the idiot, the blind, an outcast and his offspring, a person wearing a heretical sect mark — these are not entitled to a share of the heritage; to these,

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1. Mandlik translates ' a son relieves his father from creditors and debtors '. But this is doubtful. No ancient writer, so far as I know, gives credit to a son as the saviour of his father from the latter's debtors. Manu IX. 138 says that the son saves the father from the hell called '*put*'. The higher debts are those that are owed to the gods, manes and sages (as said in the Taittirīyasaṁhitā VI. 3. 10. 5) and the lower debts are the debts owed to creditors. The Aitareya-brāhmaṇa (VII. 13) says that when a man sees a son born to him he pays back a debt.

2. Vasiṣṭha mentions four, viz. ' ās'ramāntaragata ', ' klība ', ' unmatta ' and ' patita ' as ' anaṁs'a ' and allows maintenance only to the impotent and the lunatic. This means that ' ās'ramāntargata ' and ' patita ' are not entitled even to maintenance. As to ' parisaṁkhyā ' vide p. 106 *n* 2 above.

3. This text of Devala is quoted in 1 Bom, 177 at p. 183. ' When the father is dead ' —this is only illustrative. Even when the father is living and he makes a partition during his lifetime or sons come to a partition during his lifetime, the persons enumerated would be excluded.

* P. 165 (text).

except the outcast, boiled-rice (i. e. food) and raiment are to be given. 'Lingī' (in Devala) means 'one who wears a forbidden sign'.[1] Baudhāyana says (II. 2. 38-41): 'They (coheirs) should support with food and clothes those who are beyond (i. e. incapable of) transacting business and those who are blind, idiots, one impotent, one addicted to vice, one afflicted with disease and those that engage in prohibited actions, except the *patita* and his issue.'[2] Madana and others say that one who is an apostate from the order of asceticism and his sons also are not to be maintained.

The sons, [3]however, of those excluded from a share (or inheritance), if they are blameless (free from defect &c.), do get a share, because Viṣṇu (15. 34-38) says 'the *aurasa* (legitimate) sons of these alone are entitled to take a share, but the sons of the *patita* born after the commission of the sinful act (which causes the bar of the exclusion) do not (take a share) and so also those who are born of women of higher caste (than their husband's) do not take a share nor do the sons (of these latter) take a share even in the wealth of their paternal grandfather[4] and because Yājñavalkya (II. 141) says 'the aurasa (legitimate) and kṣetraja sons of these, if free from blame, are entitled to a share'.[5]

*Yājñavalkya states (II. 141-142) a special rule concerning the daughters and wives of these (excluded persons):

1. The Dāyabhāga and Vīr. explain liṅgī' as 'pravrajita' (the sannyāsin); the explanation of Nīlakaṇṭha is supported by Medhātithi's comment on Manu IV. 30.

2. The text of Baudhāyana is quoted in 1 Bom. 177 at p. 183. 'Atītavyavahārān' may also mean 'those who transgress the ordinary rules of conduct'.

3. In *Bapuji* v. *Panduranga* 6 Bom. 616 it is said at p. 621 'Admittedly not one of the books referred to lays down anything with respect to the rights of inheritance of after-born qualified sons of excluded persons where an estate has already vested in a member of the family by right of survivorship'. In *Krishna* v. *Sami* 9 Mad. 64 (F. B.) it was held that the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share in the lifetime of their father, notwithstanding the fact that they were born after the death of their grandfather. Vide *Vaman* v. *Krishnaji* 21 Bom. L. R. 427 for the adopted son of a *patita* succeeding to his father's separate property though the adoption took place after the father became *patita*. Vide *Pawadewa* v. *Venkatesh* 32 Bom. 455.

4. The force of 'api' in 'paitāmahepyarthe' is as follows. The general rule is stated to be that the blameless sons of those excluded take a share; an exception to this is the son of a *patita* born after the man became patita and there is a further exception; we saw above from Kātyāyana's text that the son of a *pratiloma* union does not inherit to his father; the blameless son of the son of a *pratiloma* union would not succeed to the wealth of his grandfather i. e. of him who married a woman of a higher caste than his own.

5. The impotent particularly may have a kṣetraja son. Vide Manu IX. 203. The Mit. says that the express mention of aurasa and kṣetraja shows that other kinds of sons (of those excluded from inheritance) are not entitled to a share or to inherit. The Sm. C. says that as kṣetraja is forbidden in the Kali age the text of Yāj. applies only to the Dvāpara age.

* P. 166 (text)

The daughters of these (excluded persons) should be maintained till they are married and their sonless wives leading a virtuous life should also be maintained; but the unchaste ones should be expelled and so also those who are hostile.

According to Madana and others in the case of unchastity, they (the wives of excluded persons) should be expelled and not fed; when they are hostile they should be (only) expelled but maintenance must be given to them.[1]

(Here) ends the (section on) partition of heritage.

New begins (the section on) recovery of debts.[2]

Hereon Bṛhaspati (p. 319 v. 1) states the procedure to be followed by the creditor in lending money:

> A creditor shoud always advance a loan after securing a pledge of adequate value or a hypothecation or substantial sureties or have it consigned to writing or before witnesses.[3]

'Bandha' means a restrictive agreement (by the debtor) in the form 'so long as the debt due to you is not discharged, I shall not enter into a transaction of gift, sale or mortgage of this house, field or other thing.' Lagnaka' means 'a surety'. The same author (Bṛ. p. 320 v. 2) says:

> *Since it (loan) is recovered without any qualm four times or eight times (as much) from a wretched man who is sinking (distressed), it is therefore known as *kusīda* (usury).[4]

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1. The Mit. says that merely because they are hostile they should not be deprived of maintenance if they are chaste. The V. R. remarks that 'pratikūla' does not mean 'quarrelsome' but connotes hostility (such as attempt to poison &c.). Vide *Valu* v. *Ganga* 7 Bom. 84 at p. 88 where the verse of Hārīta together with the comment of Mayūkha is quoted and also *Ilata Shavitri* v. *Ilata Narayanan* 1 Mad. H. C. R. 372 where the Mayūkha is quoted in a note.

2. There are, according to Nārada, seven heads to be discussed under the title of 'recovery of debts', two from creditor's point of view (viz. the method of lending and the manner of recovering) and five from the debtor's point of view (viz. what debts must be paid, what debts need not be paid, who is liable to pay debts, at what time, and in what manner).

3. Vide notes to V. M. pp. 318--319 for the various definitions of *ādhi* and *bandha*. The two words are often used as synonyms. Bṛhaspati himself defines 'ādhi' as *bandha* later on (under 'pledge'). 'Ādhi' is here distinguished from 'bandha' and means 'a pledge or mortgage with possession' while 'bandha' seems to be a simple mortgage or hypothecation, where the creditor is not given possession and the thing remains in the possession of the debtor or a common friend. Vide Mit. on Yāj. II. 59.

4. This gives an etymology of 'kusīda' from 'ku' (bad) and 'sīda',

* P. 167 (text)

Kātyāyana says:

That rate of interest which the debtor promised in addition (to the rate allowed by *s'āstra*) and which was promised in a time of difficulty (or distress) must always be given; it is termed *kāritā*; that is known as *s'ikhā-vṛddhi* (interest growing like the top-knot of hair on the head) when (the debtor) pays (interest) every time. [1]

'Pratikālam' (in Kāt.) means 'from day to day, from month to month and from year to year'. Yājñavalkya (II. 37) says:

An eightieth part (of the principal) is the interest every month when (a loan is advanced) on a pledge; otherwise (when money is lent without a pledge) interest may be two, three, four or five percent (every month) in the order of the (four) classes (brāhmaṇa, kṣatriya &c.).[2]

'Anyathā' (in Yāj.) means 'when there is no pledge'. Vyāsa says:

Monthly interest is declared to be an eightieth part (of the principal) when there is a pledge, sixtieth part when there is a surety (but no pledge) and two per cent when there is no pledge nor surety.

Yājñavalkya (II. 38) says:

(Borrowers) who travel through forest (for trade &c.) should pay ten per cent and those who travel by sea twenty per cent (per month).

'Dadyuḥ' is to be understood as connected (with this verse) from the following clause (in Yāj.):

All of whatever class should pay the interest stipulated by themselves.

Viṣṇu (Dh. S. VI. 40.) says:*

He, who, having taken a loan of whatever kind with the promise 'I shall return an equal amount tomorrow' does not afterwards return it through greed, would have to pay interest from that day. [3]

Kātyāyana declares when interest can be charged on a loan (of an article for use):

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1. Interest is either *kṛta* (agreed upon between the parties) or *akṛta* (not so agreed). According to Gautama XII. 31--32 and Bṛ p. 32 = vv. 5-11, kṛta is of six kinds, kāyikā, kālikā, cakravṛddhi, kāritā, s'ikhāvṛddi and bhogalābha (Gautama calls his sixth variety ādhibhoga). Manu VIII. 153 and Nār. (p. 66 vv. 102--104) mention the first four out of the above six. Vide notes to V. M. pp. 313--314 for the explanation of all the six.

2. As the eightieth part was to be given every month, the interest comes to 15 per cent per annum. When there was no pledge, a brāhmaṇa debtor had to give 24 per cent per annum, a kṣatriya 36 per cent per annum and so on. Manu VIII. 140 ascribes the rule about eightieth part to Vasiṣṭha. Vide Manu VIII. 142 which prescribes two, three, four and five per cent just as Yāj. does.

3. These and the following verses contain cases where no interest is originally stipulated, but where the law allowed interest to be charged in certain circumstances.

* P. 168 (text)

When [1] a person takes a loan for use (yācitaka) and goes to another country without returning it, that loan begins to carry interst after a year (from the date of loan). He who after borrowing money goes to another country without returning it even though he be requested (to repay), that loan carries interest after three months (from demand). When a person does not return (a loan) at any time even though he be in the country and even when he is requested to return it, (the king) should make him pay interest from that day (i. e. day of demand) though none was stipulatod and though he is unwilling to pay.

Nārada (p. 68 v. 108) says:

There shall be no interest in any case where things are lent through friendship, in the absence of a stipulation (to that effect) but even when there is no stipulation such a loan carries interest after half a year.

Kātyāyana says

What[2] has been lent through friendship carries no interest as long as it is not demanded back; but if it be not returned even though it is demanded back, it bears interest at (the rate of) five percent (per month). If* a man, after buying a marketable commodity, goes to another country without paying the price, that money (price) will earn interest after three ṛtus (i. e. after six months).[3] A deposit, the balance of interest, purchase and sale--these bear interest at five percent (per month) if they are not returned (or paid) when demand is made.[4]

Nārada (p. 33 v. 36) says:

The price of a commodity (sold), wages, deposit, a fine that is ordained (inflicted), a promised gift without consideration, a stake won in gambling by means of dice--these do not carry interest without an express agreement.[5]

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1. Vide notes to Kātyāyana vv. 502-504. The first verse of Kāt. applies when the lender makes no request for return, the second where he makes a request. The three verses are quoted in *Saundanappa* v. *Shivbasawa* 31 Bom. 354 at pp. 361--362.

2. This verse is referred to in 31 Bom. 354 at p. 361 and it is said (at p. 364) that it was an incident annexed to every contract of debt by the Hindu law that interest though not stipulated for should run on it in the event of non-payment after demand from the date of such demand.

3. This applies where there is no demand for the money.

4. 'Purchase and sale' --If a chattel is purchased and the purchase money is not paid even though demanded, this verse would apply and interest would run from the date of demand.

5. 'A promised gift' --a gift to dancers or bards is called vṛthā dāna. This verse is apparently in conflict with Kātyāyana's verse 'a deposit' &c. so far as deposit and the price of goods are concerned. But Nārada's verse applies where there is no demand and Kātyāyana's verse applies where there is a demand.

* P. 169 (text)

'Ākṣika' (in Nārada) means 'relating to playing with dice'; 'avivakṣitāḥ' means 'not specially agreed upon'. Yājñavalkya (II. 44) says:

If (a creditor) does not receive back his own money given as a loan when it is tendered (by the debtor) it carries no interest from that (day) if it be deposited with a third person.

Bṛhaspati (p. 322 v. 13) says:

On gold (and silver) the interest (allowed by s'āstra) is as much as (to make the debt) double; on clothes and the baser metals treble; on grain, quadruple; so also on vegetable products, beasts of burden and wool (or hair).

'S'adaḥ' (in Bṛhaspati) means 'flowers, roots, fruits and the like'; 'vāhyaḥ' means 'bullocks and the like', 'Lavaḥ' means the wool of sheep and hair of camarı deer and the like. *As to what Manu (VIII. 151) says 'interest on grain, vegetable products, beasts of burden and on hair does not exceed five times (the principal)', its purport is to prohibit taking six times as much (as the principal) or more.[1]

Kātyāyana says:

The interest stops at double (the principal) in the case of jewels, pearls, corals, gold and silver and in the case of fruits, silken cloth and wool.

'Kaiṭam' (in Kāt.) means produced from a kıṭa (insect), such as the cloth called paṭṭa, a dukūla and tasarī (which are several varieties of silk cloth). Vasiṣṭha says:

Interest on copper, iron, bell-metal, brass, tin and lead is threefold if the debt be of long standing.

Vyāsa says;

(Maximum) interest in the case of vegetables, cotton and seeds is declared to be six-fold.

Kātyāyana says:

For all sorts of oils, for liquors and ghee, the (maximum recoverable with) interest should be known as eightfold and also in the case of raw sugar and salt.

Viṣṇu (Dh. S. VI. 11-15) says: 'In the case of gold, (the maximum recoverable with) interest is two-fold, on cloth treble, on grain quadruple, on fluids eight-fold, in the case of female slaves and beasts, the offspring (is the interest)'[2]. 'Flowers, roots and fruits and what is sold by (being weighed in a) balance—in these (the increase by interest) is eight-fold (these are Vasiṣṭha II. 46-47). Nārada (p. 67. 105) says:

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1. Compare Gautama XII.33 with Manu VIII. 151. Yāj. II.39 agrees with Bṛhaspati. For various explanations of the text of Manu vide notes to V. M. p. 317.

2. It is possible to take 'strīpas'ūnām' to mean 'female beasts' (such as a she-buffalo).

* P. 170 (text).

This* is declared to be the universal (all-embracing) rule as to interest on loans; but the established usage of each country may be different and may prevail according to the nature of the debt.[1]

' Sārvabhaumaḥ ' means ' universal '. These rules about (the maximum recoverable) being double and the like (of the principal) hold good only when there is a single transaction. But if a fresh transaction be made at a different time (from the original date) or with a different person (from the original debtor) or by deductions or additions to the debt already due, then the (maximum recoverable) may be more than the highest interest (allowed by the s'āstra at one time).[2] And so also Manu (VIII. 151) says:

Interest in money-lending business does not go beyond double, when

1. This verse and the following passage of the Mayūkha are quoted in 24 Bom. 305 at p. 308.

2. The sages are not agreed as to the rate of interest on various articles and so Nārada observes that there are local usages. But all are agreed as to gold and silver or money that the interest recoverable at one time in a lump cannot exceed the principal. This is called the rule of *dāmdupat.* The principal text is that of Manu (VIII. 151) which is similar to Gautama XII.26. Nīlakaṇṭha very laconically puts several propositions about this rule. The principal rules about *dāmdupat* laid down by the Mit. and the Mayūkha are four. They are: (I) if money is lent only once to a man and interest is recovered only once in a lump then the maximum amount recoverable (together with interest) at one time cannot be more than double the sum lent, whatever the rate of interest may be and whatever the length of time may be; (II) if interest is received every month or every year and not in a lump at one time, then the total interest received may be so much that the creditor may have recovered more than double the sum lent; (III) if after the interest has accumulated for some time, there is a fresh agreement (*prayogāntara*) with the same debtor whereby the sum lent together with interest due is taken as the principal and fresh interest is agreed to be paid on the sum so arrived at, then the total recoverable after this second agreement may exceed more than double the sum originally lent (this is *kālāntareṇa prayogāntare* of the Mayūkha); (IV) if after the sum due to the creditor has become double of the sum lent, the creditor accepts another man as the debtor (who takes the liability upon himself), then the creditor may recover from the substituted debtor after the lapse of years a sum which may be more than double the sum originally lent by the creditor (this is '*puruṣāntareṇa prayogāntare* ' of the Mayūkha). It is not necessary in cases falling under the third rule that the whole sum due (principal and interest) should be capitalized and again put to interest; it may be that the creditor makes a deduction (reka) from the sum due by way of concession or he may make an addition (seka) by a further cash payment and then put the whole to interest (this is ' *tatraiva rekasekādinā vā prayogāntare* ' of the Mayūkha). Vide the Mit. on Yāj. II. 39. There are numerous cases explaining the limits of the rule of *dāmdupat.* Vide 1 Bom. 78, 3 Bom. 181, 20 Bom. 721 (F. B.), 1 Bom. L. R. 551 (at p. 555 three propositions are summarised), 35 Bom. 199, 21 Bom. L. R. 419 and notes on Kāt. vv. 510--512. Under the Deccan Agriculturists' relief Act (XVII of 1879) the benefit of the rule of *dāmdupat* is given even to non-Hindu debtors, if they are agriculturists.

* P. 171 (text)

it is but only once calculated.[1]

Vijñānes'vara and others who are conversant with traditions say that in one transaction of money-lending, if interest is received at various times, more than the highest interest (allowed by the s'āstra at one time) may be recovered (in the aggregate).

Now the rules about pledge.

Bṛhaspati (p. 322 v. 17) says :

Ādhi is known as a pledge and is declared to be divisible into four varieties, viz. movable, immovable, for custody (only) and for use.[2]

Nārada (p. 72 v. 124) says :

An *ādhi* (pledge) is that which is kept with (a creditor) with power (to him over it); it is known to be of two kinds, viz. one to be redeemed at or within a fixed time, (the other) to be retained till the debt is paid off.[3]

Hārīta says :

A pledge must be preserved in the same state in which it was deposited (with the creditor); otherwise the (pawnee) loses his interest and if there be damage to or loss of the pledge, the principal is lost.

* ' Vyatikramaḥ ' means ' loss of the pledge '. Yājñavalkya(II. 59) says :

If a pledge that is to be kept in custody only were used (by the creditor) he shall receive no interest; so also if a pledge that is to be used be damaged.

' Hāpite ' means ' reduced to a state in which it is unfit for use '. Kātyāyana says;

(The creditor) who would make the pledge work against the latter's will and without the consent (of the pledgor) shall be made to pay (the price of) the fruits of labour (to the pledgor) or he would not get his interest.[4]

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1. There is another reading ' sakṛdāhṛtā ' (when recovered at one time and not by driblets every day or month). This verse of Manu is quoted in *Dagdusa* v. *Ramchandra* 20 Bom. 611 at p. 613 and it is held that arrears of interest recoverable at any one time are limited by the principal remaining due at that time. The words of the Mayūkha ' eka-prayoge &c. ' constitute the second rule mentioned above.

2. ' Gopya ' means ' to be kept in one's custody ' without being used or enjoyed. The fourfold division is overlapping and not logical. The pledge of a movable may be 'gopya' or ' bhogya ' as well. Nārada's division given in the following verse is much better.

3. Nārada divides each of these into ' gopya ' and ' bhogya ' and these two again may be subdivided into immovable and movable.

4. This verse refers to slaves pledged by way of gopyādhi. Compare Manu VIII. 144 and 150, Kauṭ. (text p. 179 and tr. p. 227) and Yāj. II. 59 (first half).

* P. 172 (text).

'Karma kārayet' (in Kāt.) means 'he shall employ'; 'karma-phalam' means 'the rent or wages'. Yājñavalkya (II. 59) says:

A pledge damaged or destroyed, except by the act of God or king, must be restored (by the pawnee)[1].

'Naṣṭah' means 'has undergone deterioration'. Such a pledge must be restored after bringing it to its former condition. Bṛhaspati says:

When a pledge has become worthless by being used, there is loss of principal (to the pawnee).

Vyāsa declares in the case of a pledge being destroyed that its price must be paid:

If through the fault of the receiver (i. e. pawnee) a pledge of gold and the like be lost, the creditor, on recovering the principal together with interest, should pay the price (of the article pledged).

Nārada (p. 73 v. 126) says:

If (the pledge) be destroyed except by the act of god or king, there is loss of the principal (to the creditor).

Manu (VIII. 144) says:

He (the creditor) should satisfy the pawnor by paying the price; otherwise he would be a thief of the pawn.[2]

Bṛhaspati (p. 323 v. 21) says:

If a pledge be destroyed by the act of God or king, the debtor should deliver another pledge or he should pay the loan with interest.

* Vyāsa says:

If the pledge be destroyed by the act of God or the king no blame attaches in any case to the creditor (or pledgee).

Kātyāyana says:

If the thing pledged were to fall (deteriorate) or were to be destroyed without any fault of the creditor (the pledgee) the debtor should be made to give another pledge (of equal value) and he would not be free from the debt.

Yājñavalkya (II. 60) also says:

A pledge becomes complete (valid) by acceptance (or possession) of the thing pledged;[3] if a pledge becomes worthless, even though proper

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1. Compare sec. 152 of the Indian Contract Act about loss, destruction or deterioration.

2. This is the same as Nārada p. 73 v. 127. According to Kullūka this refers to a case where the pledge is deteriorated by use; then the pledgee must give as much money as will be required to restore the pledge to its former state. According to Asahāya the pawnee must satisfy the pawnor by returning to him the profit made by using the pledge.

3. Possession is necessary in the case of a pledge (whether 'gopya' or 'bhogya') to give it validity against subsequent dealings with the thing pledged, the rule being that in the case of a pledge, gift or sale a prior transaction prevails over a later one (provided the

* P. 178 (text).

care be taken, another pledge must be kept (with the pawnee) or the creditor (pawnee) must receive his money.

Nārada (p. 77 v. 139) says :

An '*ādhi*' is declared to be of two kinds, movable and immovable; both are complete (or valid) if there is actual possession (or enjoyment) and not otherwise (i. e. if there be no possession, but mere witnesses or document).

Vasiṣṭha also says :

When[1] there are several documents of pledge executed at the same time, the pledge to him is stronger who gets possession first.

The same author says :

If two (creditors) should come on the same day with the desire to take possession, in such a case the pledge must be divided and enjoyed equally by them; this is the settled rule.

*Kātyāyana says :

If (a debtor) were to make a pledge of the same thing to two persons, what would happen to him is that the prior transaction of the two should be accepted (as enforceable or valid) and the person (debtor) who made the two pledges would be liable to the fine prescribed for a thief.[2]

Yājñavalkya (II. 58) says :

A pledge is lost (i. e. forfeited to creditor) if it is not redeemned before the debt has become double (with interest). A pledge with a fixed date (for redemption) is lost on the expiry of the time (fixed); but a pledge the fruits (or income) of which are to be enjoyed (by the pawnee) is not lost (to the pawner).

Bṛhaspati (p. 324 v. 27) says :

When the money lent (lit. gold) has become double (with interest) or when the period fixed has expired in the case of a pledge (delivered) for a fixed period, the creditor becomes the owner of the thing pledged, after having waited for a fortnight.[3]

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prior one is complete). In the case of *gopyādhi*, the *bhoga* consists in the custody of the thing though there may be no actual use. The verse of Nārada that follows is quoted in 2 Bom. 299 at p. 308.

1. Compare Viṣṇudharmasūtra v. 184 which says that possession is the determining factor in a case of dispute between two pawnees.

2. For the words 'tam prati yad bhavet' some books read 'kā pratipad bhavet', which is a better reading and means,' what should be the decision' or 'what should be the first (i. e. acceptable) transaction.' Vide Viṣṇudharmasūtra (v.181-183) which prescribes punishment for such a debtor in the case of mortgages of land.

3. This verse is ascribed to Vyāsa by several writers. It prescribes two points of time when the pawnee becomes the owner viz. when the principal has become double with interest and when the time stipulated has passed. But it allows a period of grace viz. a fortnight before the pledge becomes liable to be forfeited to the creditor.

* P. 174 (text).

Vyāsa says :

A pledge for custody only may, when the principal has become double (with interest) and in the case of a pledge for a fixed period when the time fixed has expired, be appropriated to his use (by the creditor) after informing the family of the debtor.[1]

Bṛhaspati (p. 325 v. 29) says :

When the money (lent) has been doubled (with interest) and the debtor is either dead or not heard of (for a long time) (the creditor) may catch hold of the debtor's chattel (pledged) and may sell it before witnesses.

Yājñavalkya (II. 61) says :

In the case of (a debt) contracted on the pledge of *caritra* (the king) should cause the debtor to pay the loan together with interest and he should cause to be paid double (the amount) when money has been lent with an undertaking (to the effect that double the money only will be paid).[2]

*When (a borrower) from his confidence in the creditor deposits with him for (securing) a small amount a very valuable chattel or when (a lender) from his confidence in the debtor keeps with himself (as a security) for considerable money a pledge of extremely small value, it is said to be a *caritra* pledge. Or *caritra* may mean the merit derived from ablutions in the Ganges and the like and *caritra-bandhaka* means a transaction where such merit is pledged. Both these kinds of *caritra* pledges are not forfeited to the creditor, even though the sum lent has become double (with interest) i. e. it is the money that has to be paid though it has become double and there is no forfeiture of the pledge. A pledge that is made with *satyaṅkāra* is not forfeited even though the loan has become double (with interest). The same author (Yājñavalkya II. 62-63) says :

The pledge shall be returned to the (debtor) when he comes (to redeem it) ; otherwise he (the creditor) would be (deemed) a thief. If the lender is not present (i. e. is dead or gone abroad) the debtor may get back his pledge after keeping the money (due to the creditor)

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1. This is ascribed to Bṛhaspati by Aparārka.

2. This verse states exceptions to the rule contained in Yāj. II. 58. The Mayūkha follows the Mit. in giving two meanings of 'caritra-bandhaka'. The Mit. gives two meanings of 'satyaṅkārakṛtam'. When at the time of making the pledge the debtor expressly stipulates that there would be no forfeiture of the pledge but that he would pay only double the amount lent then there is no forfeiture. This is the first meaning and the Mayūkha seems to have accepted this. The other meaning is not restricted to pledges alone. If a man makes a contract of sale or purchase he may give a chattel like a ring as an earnest (*satyaṅkāra*). If the sale goes off through the default of the man who gave the earnest, then he forfeits the earnest; but if the sale goes off through the default of the other party to the contract then the party guilty of breach had to pay double the price of the earnest to the man who delivered the earnest. Vide notes to V. M. p. 325.

* P. 175 (text),

with some other person in the family (of the creditor), or its price at the time being appraised (by arbitrators) it should remain with the creditor, but interest shall cease.

The meaning is : When the creditor is not present the pledge should be taken back after paying the debt with interest into the hands of some one else in the creditor's family ; but if he (debtor) desires to pay the debt by selling the pledge its price at that time should be ascertained and the pledge may be kept (with the creditor) but without interest (from that date). Bṛhaspati (p. 324 v. 23) says:

When a field or other property has been enjoyed (by the creditor) and from that property large income has accrued, the debtor shall recover his pledge if the principal and interest has been covered thereby (i. e. by the income received).[1]

Yājñavalkya (II. 64) says:

When a debt has become double (by interest) and then a pledge is made (to secure it) then the pledge shall be returned after double the principal has been recovered from the profits thereof.[2]

Now (begins the discourse on) sureties.

Yāj. (II. 53) declares that a surety is of three kinds.[3]

Suretyship is ordained for appearance, for assurance (or trust) and for payment.

*' Pratyayaḥ ' (in Yāj.) means the inspiring of confidence by saying ' this man is honest '. But Bṛhaspati (p. 327 v. 40) mentions four kinds (of sureties).

One says, ' I shall produce the man ' ; the other (second) says ' he is a trustworthy man ' ; (a third one) says ' I shall pay the money (lent

1. This verse applies to ' bhogyādhi '. The agreement in a ' bhogyādhi ' may be of two kinds, viz. that the income derived from the enjoyment of the pledge should be taken in lieu of interest or that a portion of the income may be taken in lieu of interest and the residue of the income be applied towards reduction of the principal. In this latter case the creditor will have to keep an account. Vide Mit. on Yāj. II. 64 for these two agreements.

2. Vide notes to V. M. pp. 327-328 for detailed explanation. According to the Mit. and Aparārka a pledge the income of which is to be taken in lieu of interest and in part reduction of principal is called ' kṣayādhi '. This verse and Yāj. II. 58 apply to different matters; the latter applies where the pledge is for custody only.

3. This verse of Yāj. is quoted in 41 Mad. 1073. Vide notes to Kāt. v. 531 for historical treatment.

* P. 176 (text).

to another); (the fourth says) ' I shall deliver' (debtor's assets to the creditor).[1]

' Arpayiṣyāmi ' (in Bṛhaspati) means ' I shall make him pay '. Kātyāyana says:

Three fortnights at the most should be allowed for finding out the absconding (debtor). If during that time he (the surety) produces him (the debtor) the surety would be absolved from liability.

' Three fortnights ' is merely indicative. The meaning is: as much time as is required (for producing the debtor), so much should be allowed. Kātyāyana says:

If the surety for appearance cannot produce (the debtor) at the time and place (agreed upon), he should carry out what he has bound himself for, except where (debtor does not appear) through act of God or the king.

' Nibandham-āvahet ' means ' he should pay the money due to the creditor '. Bṛhaspati (p. 327 v. 41) says:

The first two sureties (for appearance and honesty) must be made to pay the sum that may be declared to be due at the time (when the debtor should have paid) in case of failure; but the latter two and in their absence their sons also (are liable to pay).[2]

Kātyāyana says:

The debt (of the grandfather) arising from suretyship should in no case be paid by the grandson; even the son need pay only the principal (of the suretyship debt) of his father in all cases.

Vāysa also says:

A *grandson must pay the debt of his grandfather (except suretyship debts), a son has to pay his father's debt arising from suretyship, but only the principal; but the sons of these two should not be made to pay (the debt of their great-grandfather and grand-father respectively); this is the settled rule.[3]

1. The first three varieties of Bṛhaspati correspond respectively to the surety for appearance, honesty and for repayment. The fourth kind of surety undertakes to hand over the property (furniture in the house &c.) of the debtor in case the latter does not pay.

2. ' The latter two '— this means ' the surety for payment ' and ' for delivery of the debtor's chattels '. The son of the surety for honesty and appearance is not liable to pay his father's suretyship debt but the sons of the other two kinds of sureties are liable to pay (but not the grandsons). In *Tukarambhat* v. *Gangaram* 23 Bom. 454 at p. 459 the texts of Yāj., Bṛ. and Kāt. are examined and it is held that ancestral property in the hands of sons is liable for the suretyship debts of their father, when latter was surety for payment of money or delivery of goods; vide 28 Mad. 377, 39 Cal. 843, 26 All. 611.

3. The text of Vyāsa applies when a man stands surety without receiving any monetary consideration. The son of the grandson need pay no debt of the great-grandfather while the son of the son need not pay the suretyship debt of his grandfather. In *Narayan* v. *Venkatacharya* 28 Bom. 408 this is quoted. There are apparently conflicting texts about the liability of descendants for their ancestor's debts. But the conflict will not exist if each

* P, 177 (text).

The grandson should pay the debt of his grandfather, but only the principal; the son also should pay only the principal of the suretyship debt (of his father); this applies when the position of a surety is undertaken without receiving any monetary consideration. But where suretyship is undertaken after receiving money, the son and the grandson also should pay (the suretyship debt) with interest. And so says Kātyāyana:

> Where a person becomes a surety for the appearance of a man after receiving a pledge from him, the son of the surety should be made to pay, in the absence (of the father), the money from his paternal wealth.[1]

Yājñavalkya (II. 55) says:

> If there be many sureties, they should pay the debt (due from the principal) in accordance with their shares (i. e. equally or in proportions agreed upon); but when they have each bound themselves to the same extent (as the principal), then at the pleasure of the creditor (any one of them will have to pay the whole).

'Ekacchāyā' means an undertaking made by each 'I alone shall pay the whole (debt)'; when the sureties have resorted to such an undertaking, any one of them would have to pay according to the creditor's choice. But when the agreement is 'I shall pay in certain shares' then payment shall be made accordingly. This is the meaning. Kātyāyana says:

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text is given its appropriate scope. Ancient sages made sons and grandsons liable for their father's or grandfather's debt even if no property of the father or grandfather came to their hands. But it seemed very hard that descendants should be made to pay their remote ancestor's debts with interest. Therefore when no property existed, the great grandson was not bound to pay any debt of his great-grandfather, the grandson was bound to pay only the principal (but not interest) and the son was liable to pay the principal as well as interest. But if ancestral property existed and was taken by descendants, then sons, grandsons and great-grandsons were all bound to pay the debt to the full. This last follows from Yāj. II. 51, Bṛ. (p. 328 v. 48), Kātyāyana quoted above (on text p. 101), verses 555--558 of Kāt. and the Mit. on Yāj. II. 51. The former proposition is the subject of the verse of Vyāsa and of Bṛ. (p. 328 v. 49). The Vīramitrodaya (p. 34) very tersely but clearly puts these two propositions 'पुत्रेण रिक्थग्रहणाग्रहणयोः सवृद्धिकमेव देयम् । पुत्राभावे पौत्रेण रिक्थग्रहणे सोदयं देयम्। अग्रहणे मूलमेव । प्रपौत्रेण तु रिक्थाग्रहणे मूलमपि न देयम् ॥' As to suretyship debts a distinction was made. If no money was received, even the grandson was not bound to pay his grandfather's suretyship debt and the son was bound to pay only the principal. This is expressed by Kāt. Some writers went so far as to say that the son was not bound to pay any suretyship debt of his father (vide Gautama XII.38, Manu VIII.159, Vas. XVI. 31), while others said that the son was not bound to pay when the father stood surety for appearance or honesty but that he was bound to pay when the father stood surety for payment (vide Manu VIII. 160 and Bṛ. p. 327 v.41 cited above). In 10 Patna p. 94 it was held that if the father stood surety for honesty, the son was not bound to pay that debt. Vide also 4 Patna L. J. 309.

1. The Mit. on Yāj. II. 34 explains that this applies to the surety for honesty also. If we read 'vinā pitrā dhanāt' the meaning would be 'in the absence of the father, from that wealth (viz. from the pledge)'. 'In the absence of the father' means 'if he be dead or gone abroad'.

*Of sureties jointly and severally bound any one that is found may be made to pay (the whole debt). If he be gone abroad his son may be made to pay the whole; but if he be dead then his son shall pay according to his father's share (i. e. proportionate liability).

'Pitraṁśāt' means 'in accordance with his father's share (of the debt guaranteed).' Yājñavalkya (II. 56) also says :

When a surety has been made to pay publicly (the whole) debt to the creditor, the debtor should be made to return double the amount to him (or his son).[1]

Bṛhaspati (p. 328 v. 44) says :

He, who being made a surety and being harassed (by the creditor) pays the suretyship debt, is entitled to receive (from the original debtor) twice the amount (paid to the creditor) after the lapse of three fortnights.[2]

Now about the method to be followed by the creditor in recovering debts.

Bṛhaspati (p. 329 v. 54) says :

A debtor who acknowledges a debt to be due should be made to pay by the expedients of coaxing and the rest, by appeal to *dharma*, by artifice, by force (or compulsion) and by barring his house.

'Pratipannam' (in Bṛhaspati) means 'admitted by the debtor'; 'upakramaiḥ' means 'by expedients'. The same author (Bṛhaspati p. 330 vv. 55-58) explains these (terms, dharma etc.).

That is declared to be *dharma* (expedient) where a debtor is made to repay by the advice (or messages) of friends and good kinsmen, by coaxing words, by persistent following, or by importunate entreaties (or creditor's starvation). When the creditor brings from the debtor some object, borrowed on some pretext, or where the creditor retains an *anvāhita* deposit and thus the debtor is made to pay, that is said to be (the expedient of) artifice.[3] That‡ is declared to be compulsion where a

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1. This applies only where the surety or his son is pressed by the creditor to pay and so pays. If the surety pays out of greed to secure double of what he pays, he would not get double.

2. If the debtor pays before three fortnights expire, the surety or his son would get only what he paid.

3. 'Anvāhita' is what a debtor hands over to a creditor for being delivered to a third person. The creditor retains such a deposit and thereby compels payment. 'Borrowed on some pretext'— i. e. borrowing an ornament &c. for marriage or other festive occasion.

* P. 178 (text). ‡ P. 179 (text).

debtor is made to pay by being bound, brought to the house of the creditor and by such means as beating and the like. Where by restraining his sons or wife or cattle or by sitting down at his door, a debtor is made to pay the money (lent) that is said to be 'ācarita '[1].

'Anugamaḥ' means 'following'; 'prāyaḥ' means 'entreaty'; 'anvāhitam' means an ornament or the like given to (the creditor) for being handed over to a third person. As regards these expedients of ***dharma*** and the like Kātyāyana speaks of certain restrictions:

(A creditor) should make a king, a master or a brāhmaṇa debtor pay (a debt) by the mode of coaxing and he should make a co-heir or friend pay (a debt) by artifice only. Traders, husbandmen and artisans should be made to pay according to the usage of the country; he should make wicked debtors pay by the expedient of harassment.[2] This is the view of Bhṛgu.

The same author (Kātyāyana) says:

The debtor should be kept openly in restraint before an assembly of people according to the dictates of local custom; whatever he gives may be taken (by the creditor).

The same author (Kātyāyana) forbids the (continuance of the) confinement of a debtor when the confined debtor has an inclination to evacuate:

Where a man held confined (for debt) has an inclination to void urine or fæces, he should be followed from behind or he should furnish (another person) as a surety (or hostage).[3]

*'Nibandham' means 'a son or the like who would be a substitute for him' (the debtor). The same author (Kātyāyana) says that a confined debtor should be let off for meals after taking a surety for appearance:

That (debtor), if he has furnished a surety, should everyday be set free at the time of taking meals and at night (while) the surety remains confined. He who cannot secure or tender a surety for appearance should be confined in jail or should be placed in the presence of guards. A respectable, trustworthy and pure man should not be confined in a jail; he should be released without a surety or should be bound over on his oath.

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1. 'Ācarita' seems to be meant as a synonym for 'gṛhasaṁrodhana'. Manu VIII. 49 speaks of *ācarita* as one of the five expedients of recovering a debt. In view of the fact that *ācarita* is separately defined it is better to take 'prāyaḥ' as meaning 'entreaty'.

2. 'Sāntva' is the same as 's'āma'; 'by harassment'— this includes the modes of *bala* (compulsion) and *ācarita*. Though Manu speaks of the five expedients, there are no verses in Manu corresponding to the restrictions mentioned by Kāt. The 2nd. verse is quoted in *Raghunathaji* v. *Bank of Bombay* 34 Bom. 72 at p. 78. These means could be employed only if the debtor admitted the debt, but if he repudiated the debt, then the only remedy was an action at law (vyavahāra).

3. If we read 'nibaddham' &c. it would mean 'he should be let out with fetters on'.

* P. 180 (text).

'Na vās'rayet' means 'would not tender'; 'cārake' means 'in jail'; 'rakṣiṇaḥ' means 'he should be kept with guards who are told (about his being confined for debt)'; 'prātyayikaḥ' means 'trustworthy'. Bṛhaspati (p. 331 v. 60) says:

When the time fixed (for payment) has elapsed and interest has ceased (owing to the debt having risen to double the principal) the creditor should recover the debt or the debtor should execute a bond by the mode of compound interest.[1]

'Pūrṇāvadhau' means 'when the debt has risen to double or the like'. Hence it is reasonable that interest ceases (in such a case). The creditor should recover (i. e. take) the debt; 'cakravṛddhi' means 'calculation of interest (on the aggregate) after adding interest to the principal'. Nārada (p. 74 v. 131) says:

*If a debtor is unable to pay owing to adverse times, he should be made to pay the debt gradually (by instalments) according to his means and according as he happens to acquire (money or property).

Manu (VIII. 177) says:

Even by (doing) work (suited to his caste) should the debtor make himself equal to his creditor, if (the debtor) be of the same caste (as the creditor) or of a lower one. But a debtor of a higher caste (than the creditor) may pay (the debt) gradually.[2]

As regards what Yājñavalkya (II. 43) says:

(The creditor) may make a debtor of a lower caste work personally for liquidating the debt, if he be indigent; an indigent brāhmaṇa however should be made to pay gradually according as he happens to have means (or money)

there the word brāhmaṇa stands for any one of a superior class. The same author (Yāj. II. 40) says:

A creditor recovering an admitted debt (by the expedients of dharma &c.) will not be liable to be blamed by the king; a debtor from whom (an admitted debt) is being recovered (by the above expedients) should be fined, if he goes (i. e. complains) to the king and should be made to pay the debt.

Bṛhaspati (p. 331 vv. 62-63) says:

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1. This refers to capitalisation of interest and an agreement to pay interest on interest (and principal). This verse together with the comment of V. M. is quoted in *Suklal* v. *Bapu* 24 Bom. 305 at p. 308 for the proposition that capitalisation of interest was allowed in Hindu Law.

2. In the first half we must understand that the debtor belongs to the kṣatriya, vais'ya or s'ūdra caste and the creditor belongs to the same caste as the debtor or to a higher one. As regards a brāhmaṇa debtor the rule is contained in the last pāda. 'Make himself equal &c.' i. e. he should be free from being indebted to him. Compare a similar rule about fines in Manu IX. 229.

* P. 181 (text).

This is the rule concerning him who admits (his liability) but (a debtor) denying (his liability) shall be made to pay on (the debt) being proved in a (judicial) assembly by a writing or by means of witnesses. (A debtor) claiming judicial investigation in a doubtful case should never be put under confinement (by the creditor); but he who puts under restraint one who should not be restrained becomes liable to be fined according to law.

' Āsedhaḥ ' means ' restraint by the king's order '. The same author (Bṛhaspati p. 331 v. 64) says :

Where a debtor says ' what may be found to be justly due, that I shall pay ', such a debtor is called ' *kriyāvādī* ' (one claiming judicial proof).

*Kātyāyana says :

A creditor who harasses a debtor claiming judicial investigation would lose his money and becomes liable to a fine equal to the debt.

Bṛhaspati says :

He who, in a doubtful (or contested) case, proceeds with force (to recover his debt by *dharma, bala* &c.) without complaining to the king, should be punished by the king and that money (the debt) he cannot recover.[1]

Yama says :

That debtor, who though well off, does not return (a loan) on account of his wicked nature should be made by the king to pay (the debt to the creditor) after recovering (as a fine) from him (debtor) double (the amount of the debt).

Yājñavalkya (II. 42) says :

The debtor should be made by the king to pay (to the king) ten per cent of the claim established and the creditor should be made to pay five per cent, when he succeeded in his claim[2].

' Daśakam ' means ' with ten in addition ' i. e. the tenth and twentieth share (respectively). The sense is that these shares belonged to the king and the remaining belonged to the creditor. The levy of a tenth share (for the king as his fee) refers to a poor (debtor). But Nārada (p. 74 v. 132) states a special rule about a rich (debtor) :

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1. ' Prasahya ' may also be connected with ' vineyaḥ ' and then the meaning would be ' he should be punished severely '. Bṛ. p. 331 v. 65 says that when there is a difference of opinion between the two parties regarding the nature of the loan, about the number (i. e. about the sum advanced) or about the rate of interest stipulated, or whether the amount claimed be due or not, that is termed a doubtful case.

2. Ten per cent and five per cent recovered from the debtor and creditor respectively were in modern language the' court fee ', but it was, it appears, charged after the case was decided and not at the very institution of the suit, as now. These recoveries were made only when there was no dispute as to the debt; but where the debt itself was repudiated Yāj. II. 42 applied.

* P. 182 (text).

A debtor, who being well off, does not pay (a debt) through wickedness should be compelled by the king to pay it after taking twenty percent (from the debtor).

*The meaning is ' twenty in a hundred '.[1]

When several creditors present themselves at the same time (for payment) Yājñavalkya (II. 41) states the order (of payment):

A debtor shall be made to pay his creditors in the order in which (the loans) were taken, but after (first) discharging (the debt due) to a brāhmaṇa and afterwards that due to the king.[2]

Kātyāyana, as quoted in the Vivādaratnākara, says :

When, however, there are several debts due at the same time that which was first contracted should be paid first ; a debt due to a king (should be paid) after one due to a learned brāhmaṇa. Where (several debts) are contracted in writing on the same day, (the king) should treat all as equal so far as the security, its protection and enjoyment are concerned.[3] In other cases (i. e. where debts are not of the same date) they should be paid in order (of dates). Where a creditor establishes that a particular article for sale was manufactured (by the debtor) with the money (*or materials*) *supplied by him, the money* (*got by sale of* the article) should be given by the debtor to that creditor only and not otherwise.

Yājñavalkya (II. 93) says:

The debtor should write on the back of the document the money paid by him from time to time (by instalments) or the creditor shall pass a receipt marked with his own hand.

Nārada (p. 70 v.116) says:

When the debt is discharged (the creditor) should return the document; *in the absence of the document* (creditor) *should give* a receipt. In this way the creditor and debtor would be free from their mutual obligations.

¶' Pratis'ravaḥ ' means ' a document of release declaring that a debt

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1. Par. M. and Vir. explain differently, saying that it means ' a twentieth part ' of the claim. Compare Manu VIII. 139, Viṣṇu VI. 20-21.

2. If the creditors were of the same caste and all approached the king at the same time, debts were paid in the order in which they were contracted (i. e. the earlier prevailed over the later) ; but if the creditors were of different castes, the brāhmaṇa creditor was paid first though his debt was later in date than that of a kṣatriya creditor. Vide sec. 48 of the Transfer of Property Act (for the the proposition that the first in time prevails) and sec. 56 of the Bombay Land Revenue Code (which makes state revenue a paramount charge on the land).

3. This verse states a rule of rateable distribution among several debts if the debtor is not able to pay all fully. The same rule applies to a pledge, to the expenses of preserving it and to the interest or enjoyment of it.

* P, 183 (text). ¶ P, 184 (text).

was returned '.[1] Kātyāyana states the evil results happening to a debtor in case he does not repay a debt:

He, who, having taken a debt or the like does not pay it back to the owner (creditor), is born in (the latter's) house as a slave, a servant, a wife or a beast.[2]

' Uddhāraḥ ' means ' a debt '; by the word ' ādi ' (in uddhārādikam) a friendly loan and deposit are included. ' Dāsaḥ ' means ' a born slave '; ' bhṛtyaḥ ' is one who is secured for wages. Nārada (p. 44 vv. 7--8) says:

The debt or promised gift which a debtor does not pay even when demanded goes on multiplying till it reaches to a thousand millions. On that amount being reached, the debtor enveloped in (the consequences of) that act shall be born in each successive birth a horse, a donkey, a bull or a slave.

'Pratigraham ' means ' what is promised to be given '. Vyāsa also says:[3]

If an ascetic or an ***agnihotrin*** (one who keeps sacrificial fires) were to die indebted, all (the merit of) his austerities and ***agnihotra*** will belong to the creditor.

Bṛahaspati (p. 328 v. 49) says:

The father's debt, when proved, must be repaid by the sons as if it were their own (i. e. with interest). The debt of the grandfather should be paid equal to the principal (i. e. without interest); and the son of the grandson need not pay at all.[4]

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1. The V. R. and Aparārka explain ' pratis'rava ' as meaning ' a verbal acknowledgment in public (or before witnesses) of the repayment of a debt '. This is, according to Amara, the proper meaning. The meaning assigned in the text is far-fetched.

2. Compare Nārada p. 44 vv. 7-8 quoted later on.

3. This is Nārada p. 44 v. 9.

4. Vide text p.177 Vyāsa's verse. This verse is quoted in *Narayanacharya* v. *Narso* 1 Bom. 262 at p. 266. Bṛhaspati as said there is referring to a case where no property comes to the grandson. The Mit. on Yāj. II. 51 distinctly says that if the great-grandson and the like take the estate of the deceased, they have to pay the debt of the great-grandfather. Modern decisions have followed this view of the Mit. In 19 All. 26 (F. B.) and 4 Patna 478 a grandson taking assets was held liable to pay his grandfather's debt with interest, while L.R. 53 I. A. p. 204 (=48 All. 518) decides that the great-grandson who has taken assets is liable to pay the debt of the great-grandfather with intetest just as a son is liable. In 48 All. 518 at p. 526 Yāj. II. 50 and Bṛ. are quoted. In *Narsinharao* v. *Krishanarao* 2 Bom. H. C. R. p. 64 it was held (probably following Bṛhaspati) that the grandson was liable to pay the debt of his grandfather without interest independently of the question whether he took assets. In order to remove the great hardship on heirs (taking no assets) caused by this decision Bombay Act VII of 1866 (The Hindu Heirs Relief Act) was passed whereby it is provided that a son or grandson is not liable to be sued for the debts of his deceased ancestor merely by reason of his being a son or grandson and that the son or grandson or other heir shall be liable only to the extent of the assets that came to his hands. In 19 All, 26 (at p. 29)

Yāj. (II. 50) says:

> When the father has gone abroad or is dead or is overwhelmed by difficulties, his debt if proved by witnesses when it is disputed (by the sons or grandsons) must be paid by sons and grandsons. [1]

Nārada (p. 46 v. 14) says that the son and the rest were bound to pay the debt (of the father &c.) only when twenty years old :

> When the father had gone abroad and also in the case of the uncle or eldest brother (going abroad) the son (or the nephew &c.) was not bound to pay the debt before the twentieth year.[2]

Kātyāyana says:

> A debt incurred by the father, if he is afflicted with disease or has left his country for another must be paid by the sons after the twentieth year even when the father is living.[3]

The word ' proṣita ' (gone abroad) is indicative also of ' one dead '. Hence Viṣṇu (Dh. S. VI.27) says 'when the borrower is dead or has become an ascetic (*sannyāsin*) or has lived abroad for twenty years, the debt must be paid by his sons and grandsons'. Nārada (p. 41 v.2) says:

> When the father is dead, the sons should pay the (father's) debt according to their shares if they be divided; but if undivided then he (out of the sons) should pay who bears that responsibility (as a manager of the family).[4]

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two verses of Kātyāyana about the grandson's liability to pay with interest and also without interest are referred to. In 4 Patna 478 (at p. 482) the judges express their inability to understand what Bṛhaspati means when he says that the grandson should pay grandfather's debt without interest and follow Yāj. and Viṣṇu and refuse to follow Bṛhaspati. They had no idea of the particular circumstances under which alone, as shown above, Bṛhaspati's text was to be applied.

1. This verse makes no distinction between sons and grandsons as to the payment of debts (while Bṛ. makes that distinction) and applies where assets are taken by the grandsons. The Mit. explains ' vyasanābhipluta ' as ' afflicted with an incurable disease ', while Aparārka explains as ' addicted to drinking or other vices '. If there were sons and grandsons the Mit. says that the sons were the first to pay. This verse is quoted in 42 Mad. 711 (F. B.) at p. 730.

2. This does not apply to a debt incurred by the father and others for a family necessity. Such a debt must be paid at once. This verse states the liability of the son and others when the father, uncle or brother was alive though gone abroad and the debt was not for family necessity. Nīlakaṇṭha refers ' twenty years ' to the age of the son &c; while other authors like the Vīr. refer them to the lapse of time after the father went abroad. Viṣṇu VI. 27 quoted in the text later on supports this latter interpretation.

3. This verse is referred to in I. L. R. 41 Mad. 136 at p. 140 and 42 Mad. 711 (F. B.) at p. 730.

4. This verse is quoted in *Narayanacharya* v. *Narso* 1 Bom. 262 at p. 266 and in 19 All. 26 (F. B.) at p. 28. Vide *Udaram* v. *Ranu* P. J. for 1875 p. 26 at pp. 28-29 for texts.

* P. 185 (text).

Kātyāyana says:

While the father's debt remains (unpaid), the son shall not take the father's wealth, which should be given to the creditor; even without (paternal) wealth the son is made to pay the father's debt.

The word ' dravyam ' (in Kāt.) is to be connected with ' ṛte ', the meaning being ' without or in the absence of wealth '. Bṛhaspati (p. 328 v. 48) says:

The father's debt must be paid first of all and after that a man's own debt; but a debt contracted by a grandfather must always be paid even before these two. [1]

*Yājñavalkya (II.47) says:

The son shall not pay his father's debt contracted for wines, lust and gambling or due on account of unpaid (portions of) fines or tolls or on account of an idle promise.

Bṛhaspati (p. 329 v. 51) says:

(The king) should not make the son pay a debt (of his father) incurred for wines or (losses) in gambling with dice, for idle gifts or promises made through lust or wrath, or for suretyship, or for the balance of a fine or toll.

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1. This verse is in apparent conflict with another verse of Bṛ. quoted above (vide p. 214n 4). This verse must be taken as referring to a case where assets were taken by the grandson. The number of cases in which the son's or grandson's liability to pay the father's or grandfather's debts has been recognised in modern decisions is incalculable. It is impossible to refer to them. The several propositions deducible from the decided cases are summarised in *Joharmal* v. *Eknath* 3 Bom. L. R. 322 and very recently by the Privy Council in *Brij Narain* v. *Mangla Prasad* L. R. 51 I. A. 129 (= 46 All. 95). The propositions laid down by the P. C. are : (1) The manager of a joint undivded estate cannot alienate or burden it except for purposes of necessity; (2) if the manager be the father and the other members be his sons, he may, so long as it is not for an immoral purpose, lay the estate open to be taken in excution upon a decree for the payment of his personal debt; (3) if the father purports to burden the estate by a mortgage, it would not bind the estate unless it is made for discharging an antecedent debt; (4) ' antecedent ' means ' antecedent in fact as well as in time ' i. e. it must be truly independent of and not part of the transaction impeached by the son; (5) this result is not affected by the question whether the father is alive or dead. It will be seen that in propositions 2 and 3 the Privy Council makes a distinction between a pure money debt of the father and a debt of the father secured by a mortgage. The ancient Hindu Law books afford no warrant for this distinction. Besides the P. C. in *Suraj Bunsi Koer* v. *Sheo Proshad* 6 I. A. 88 at p.106 (=5 Cal. 148, 171) for the first time used the words ' antecedent debt ' for which there is nothing corresponding in the Sanskrit texts and round which elaborate arguments have centred in numerous cases. According to the P. C. (proposition 5) the son's pious duty to pay his father's debt is as absolute during the father's lifetime as after his death. This goes far beyond the spirit of the ancient Smṛti texts which made the son liable during the father's lifetime only if the father had gone abroad for many years or was afflicted with incurable disease or was extremely old. Vide Yāj. II. 50, Nārada and Kātyāyana quoted above.

* P. 186 (text).

Us'anas says:

The son need not pay the fine or the balance of a fine, the toll or balance of a toll or (any debt) which is not *vyāvahārika.*[1]

Yājñavalkya (II. 51) mentions the order of those who are responsible for the payment of debts.

He who receives the estate (of the deceased) should be made to pay his debt and so also one who takes the wife (of the deceased); failing them, the son (should be made to pay) when no paternal wealth has gone to another person; those who take the wealth of a sonless man (should be made to pay his debts).

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1. These verses of Us'anas, Bṛhaspati and Yāj. state exceptions to the rule (Yāj. II 50) that sons (and grandsons) had to pay their father's debts. A debt due to lust is defined by Kātyāyana (v. 564) as one promised orally or in writing to a woman who is another's wife or who is not married to the father. A debt incurred through wrath is defined by Kātyāyana (verse 565) as one promised to a man to whom the father caused physical injury or whose wealth the father destroyed by way of pacifying him. 'An idle gift' is one promised to bards, wrestlers, jesters and the like. In numerous decisions these three verses about debts that the son was not bound to pay have been quoted and explained. The greatest difficulty is caused by the words 'na vyāvahārikam' in Us'anas. They have been variously interpreted by Sanskṛt commentators. Aparārka explains as 'na nyāyyam' (not righteous or proper), Sm. C. as 'saurikam' (incurred for drinking) and Vir. does the same. The Bālambhaṭṭī explains as 'na kuṭumbopayogī' (not for the benefit of the family) while Vivādacintāmaṇi explains it as 'vyavahāra-bahiṣkṛta' (what is beyond the ordinary conduct of a person). This divergence is reflected in the modern decisions also. In *Durbar Khachar* v. *Khachar Harsur* 32 Bom. 348 'na vyāvahārikam' was explained as a debt which the father ought not as a decent and respectable man to have incurred and it was said that the son was not liable for debts attributable to his father's failings, follies and caprices. This was doubted in 40 Bom. 126 and 43 Bom. 612 and disapproved of in 39 Cal. 862 (where it was rendered as 'not lawful, usual or customary'), 37 Mad. 458 (explained as 'not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a court of justice'), 38 All. 472, 4 Lahore 93 (which at p. 97 follows the explanation in 37 Mad. 458). In the latest Bombay cases *Bai Mani* v. *Usafali* 33 Bom. L. R. 130 (at p. 133) and *Bal* v. *Maneklal* 34 Bom. L. R. 55 at pp. 67—68 (=56 Bom. 36) the various meanings of 'na vyāvahārikam' and the conflict of judicial decisions are set out. In the latter case (at p. 69) the wide interpretation contained in 32 Bom. 348 has not been accepted. In this Bombay case it was held that the trade debts incurred by a Hindu father for the purposes of a trade started by himself are binding on his sons. But this proposition seems to be wrong in view of the Privy Council ruling in the *Benares Bank Ltd.* v. *Hari* 34 Bom. L. R. 1079 (P. C.), where it was held that a business started by the father as manager cannot, if new, be regarded as ancestral so as to render the minor member's interest in the joint family property liable for debts contracted in the course of the business. Another difficulty is caused by cases where the father incurs liability for misappropriating money as a guardian or trustee or is guilty of a criminal act. Vide 31 Mad. 161 and 472 (distinguishing 27 Mad. 71), 48 All. 9, 51 All. 386 (at p. 391 'na vyāvahārikam' referred to), 43 Bom. 612. In *Bai Mani* v. *Usafali* 33 Bom. L. R. 130 it was held that a Hindu son is not liable to pay his father's debt where the liability arises directly from a criminal act (e. g. where the father being appointed guardian of a minor misappropriates minor's money).

That man is termed '*rikthagrāhaḥ*' (in Yaj.) who takes the wealth of the (deceased) father of a person, either justly because the son though living is affected by defects such as impotency and the like or unjustly when there is no defect (in the son). In the same way *yoṣidgrāhaḥ* is one who takes the wife of another (after the latter's death). The condition that no paternal wealth should have gone to another may occur in two ways, either because there is a non-existence the counter-entity of which is characterised by the quality of going to another or because there is non-existence the counter-entity of which is merely the qualifying adjunct viz. estate.[1] Here the meaning is that he who takes the estate has first to pay the debts (of the deceased); on failure of him the taker of the wife (has to pay the debts); on failure of him, the son when the estate has not gone to any other person (because none exists); on failure of him (the son), the grandson (has to pay) only the principal (and no interest); on failure of him the great-grandson, the wife, the daughter and the rest who are 'rikthinaḥ' (i. e. if they take the estate) should pay the debts of the deceased. If* no inheritance[2] is received then debt is not payable by the great-grandson, by the wife and the rest. Heritage, when taken, even though small, leads to the liability to pay off debts even though

1. The verse 'rikthagrāha &c.' is a very difficult one and various interpretations have been proposed. Vide for details notes to V. M. pp. 340-345. The meaning of the rather obscure clause in the Mayūkha 'the condition...... estate' is this : a son may be one whose paternal wealth has not gone to another person in either of two ways. First, the father may have left no wealth ; in such a case the son inherits no property and so such a son is 'ananyās'ritadravya' (as no property exists); secondly, a father may have left property and also sons ; in such a case the wealth that exists will not go to another and so the son will be 'ananyās'ritadravya'. The rule is that he who takes the estate should pay the debts. If a man died leaving property, a congenitally blind son and a nephew, the nephew would have taken the estate. In such a case in spite of the rule 'putrapautrair-ṛṇam deyam' the nephew would have to pay the debts because he takes the estate. If there is no wealth, but a man leaves a widow and a son, the man who takes his widow had to pay debts and not the son who took no assets. This text does not prescribe re-marriage. Remarriages were prohibited by Manu (V. 162), but by custom or otherwise they did take place. In that case the man who took the widow (as a wife or mistress) had to pay the deceased man's debts. This was apprehended to be the law even in modern times and so sec. 4 of the Bombay Act VII of 1866 (Hindu Heirs Relief Act) expressly provides 'no person who has married a Hindu widow shall merely by reason of such marriage be liable for any of the debts of any prior deceased husband of such widow'. If a man left no wealth and none took his widow, then his son, though he took no wealth, had to pay his deceased father's debt. This is expressed by 'putro &c.'. It might be contended that 'ananyās'ritdravyaḥ' means that wealth exists but has not gone to another. To that Nīlakaṇṭha replies by saying that even when merely wealth does not exist the son may yet be called 'ananyās'ritdravya.' and that this second meaning of 'ananyās'ritadravyaḥ' is intended in the verse of Yāj. and not the first meaning.

2. This sentence and the next are referred to in *Lakshman* v. *Satyabhamabai* 2 Bom. 494 at p. 499. This proposition of the Mayūkha about a small estate making the taker liable to pay heavy debts is not supported by the Mit. or any other high authority.

* P. 187 (text).

comparatively very large. It is not a rule that heritage which is equal to or more than the debts alone leads to liability to pay debts. Another meaning of the last quarter of the verse is: of a creditor who is sonless, the 'rikthinaḥ' i. e. the wife, daughter and the rest who are entitled to take his estate should recover the debts from the debtor of their husband and the like. Viṣṇu (Dh. S. VI. 29) says 'the man who receives the assets of the deceased, whether he have sons or he be sonless, shall pay his debts'. Bṛhaspati (p. 329 v. 52) says:

'The taker of the wife is similarly liable (to pay the debt) in the absence of a taker of the estate'. Kātyāyana says:

(The king) should make the son pay (the debt of his father), if he be free from disease, capable of taking the estate (of his father) and is able to shoulder (the liability) ; but (he) should not make the son pay otherwise. First the taker of a man's wealth should pay his debts; after him the son should pay ; when there is no son or when the son is very poor the taker of the wife (shall pay the debt).[1]

Nārada (p. 47 v. 21) says:

But if a widow has plenty of wealth and has offspring and repairs to another (man) together with them (the wealth and offspring), that man must pay the debt contracted by her (deceased) husband or he must abandon her together with her wealth and offspring.

Kātyāyana says:

The debt contracted by liquor-sellers and the like who have no wealth and no sons should be paid by him who enjoys their wives.[2]

*Nārada (p. 48 v. 23) says:

Among the three, viz. the taker of the wealth (of the deceased), the taker of his widow and the son, he is liable for the debts (of the deceased) who takes his wealth; on failure of the taker of the widow and of the taker of the wealth, the son (is liable for the debt); on failure of the taker of the wealth and of the son, the taker of the widow (is liable for the debts).[3]

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1. 'Capable of taking' i. e. not liable to be excluded from inheritance for causes mentioned in Manu IX. 201 and Yāj. II. 140; 'able to shoulder' i. e. of age and able to pay back the debt. There is an apparent conflict between the second verse of Kāt. and Yāj. II. 51 (rikthagrāha &c.). But really there is none. Kāt. here provides for a special case viz. if there are no assets of the deceased then the son who has much more property of his own than the taker of the wife (of the deceased) should pay the debt; when the son is not wealthy and no assets are left by the deceased, then the taker of the wife should pay.

2. Mandlik translates (p. 114) 's'auṇḍika' as drunkard but, this is wrong.

3. We must take the third quarter as corresponding to Yājñavalkya's 'putroSnanyās'ritadravyaḥ'. But the words of the last quarter seem to be in conflict with the order proposed by Yāj. (viz. first 'rikthagrāha', then 'yoṣidgrāha' and then the son who is 'ananyās'ritadravya'). Therefore Nārada's last quarter must be taken as referring to a case where there is no son richer than the second husband or paramour of the widow of the deceased, as in Kātyāyana's text quoted above (first the taker of the assets should pay &c.).

* P. 188 (text)

The meaning of the last quarter is that in the absence of a rich son, the taker of the widow must pay the debts (of the deceased), on account of the text of Yāj. (II. 51) cited above. Kātyāyana says :

A debt incurred for (the purposes of) the family by the slaves, the wife, the mother, the pupil or the son (of the head of the family) even without his consent when he is gone abroad should be paid by him (by the head of the family). This is the view of Bhṛgu.[1]

Yājñavalkya (II. 46) says :

A woman is not bound to pay a debt incurred by her husband or son, nor is a father (bound to pay a debt) contracted by his son, nor the husband (a debt) contracted by his wife, unless the debt be contracted for the purposes of the family.

Kātyāyana says :

That which has been promised or which was ratified after (it was contracted) must be paid.[2]

Nārada (p. 45 v. 11) says :

The father should pay that debt of the son which was contracted (by the son) in serious difficulties (i. e. in danger to life).

Yājñavalkya (II. 48) says :

Among herdsmen, vintners, dancers, washermen, hunters, the husband must pay the debts of his wife, since their livelihood depends on their wives.[3]

The same author (Yāj. II. 49) says :

A *woman should pay a debt (of her husband) agreed to by her or which was contracted by her jointly with her husband or a debt which was contracted by herself alone ; she need not pay other debts.[4]

A woman taking the estate shall pay debt (of the deceased) even when she did not agree to it. To the same effect is Kātyāyana :

A wife who was addressed by her husband when about to die ' you

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1. This verse and the following one of Yāj. are quoted in *Virasvami* v. *Appasvami* 1 Mad. H. C. R. p. 375 at p. 379 *n* (where it was held that, when a husband married a second wife and the first wife left him, the first wife had no implied authority to borrow money for her support). Compare Manu VIII. 166, Yāj. II 45, Nār. p. 45 v. 12 and Bṛ. p. 329 v. 50.

2. This verse refers to a debt not contracted for the purposes of the family but is an individual debt which another member of the family (such as the father or brother) was not bound to pay unless he promised at the time that he would pay it or unless he ratified it.

3. This is quoted in *Raghunathji* v. *Bank of Bombay* 34 Bom. 72 at p. 78. Compare Nārada p. 47 v. 19 and Viṣṇu VI. 37 for the same rule.

4. This verse is quoted in 1 Bom. 121 at p. 124. In *Narotam* v. *Nanka* 6 Bom. 473 (where most of the texts as to a woman's liability for husband's debt are discussed) it was held that a married woman who contracts a debt jointly with her husband is liable to the extent of her strīdhana only and not personally.

* P. 189 (text).

should pay my debts' should be made to pay (the debts of her husband). The woman should pay the assets that came to her.[1]

Nārada (p. 47 v. 20) says :

If a woman who has a son forsakes her son and goes to live with another man, her son alone should pay all her debts if she has no property.[2]

This verse refers to a son who has taken the assets (of his father). Nārada (p. 42 v. 3) says :

That debt which was contracted for the family by an undivided uncle, brother or mother must be discharged by all the sharers in the assets (of the family).[3]

In regard to the discharge of debts when the creditor or his sons and the like do not exist Nārada (p. 69 vv. 112-113) declares the mode :

Whatever is to be paid to a brāhmaṇa creditor, who is no more together with his family (i. e. neither he nor his children are alive) should be given to his kinsmen and in default of them to his *bandhus*.[4] Where there are neither kinsmen, nor relatives nor *bandhus*, it should be paid to (other) brāhmaṇas ; on failure of even these (other brāhmaṇas) he must cast it into the waters.

Prajāpati also says :

On failure of the *bandhus*, (the debts owed to a brāhmaṇa) should be given to brāhmaṇas or thrown into the water ; for, whatever wealth has been thrown into the water or fire is of benefit in the next world.

When, however, after the (amount of a) debt has been thrown into the water or the like the creditor returns, he shall surely obtain it.

Here ends the section on recovery of debts.

1. The reading in the text is rather difficult to construe. The reading of the Vir. 'dhanaṁ yadyās'ritaṁ striyā' is better and means 'if the husband's assets came to the woman'.

2. Vide notes to V. M. p. 349 for various explanations of this verse. The son who has property should pay his mother's debts, even though she forsakes him, if she is poor.

3. Compare Yāj. II. 45, Manu VIII. 166. Vide *Bhala* v. *Parbhu*, 2 Bom. 67 at p. 72 and 43 All. 604 at p. 606 (where when a woman succeeded as mother to her deceased son and alienated certain property to pay off her husband's time-barred debts it was held that she had no authority to do so).

4. 'Sakulyas' are members of the same *gotra* as himself (i. e. uncles and their sons, grand-uncles &c.) and *bandhus* are cognates like the maternal uncle and his son. If the creditor was a kṣatriya, vais'ya or s'ūdra, then instead of throwing the debt into water, it was to be paid to the king. The king was the ultimate heir except to the wealth of a brāhmaṇa.

* P. 130 (text)

Now (the treatment of) deposit.[1]

Nārada (p. 120 v. 1) says :

Where a man without any suspicion entrusts any property of his own to another in confidence, that is said by the wise to be the title of law called deposit. What is deposited under seal without being counted or being shown should be known as *upanidhi* and nikṣepa is known to be made after counting (the contents).

Bṛhaspati (p. 333 vv. 6 and 9) says :

The merit which accrues to a man making a gift of gold, baser metals, clothes, and the like belongs to him who preserves a deposit or who protects one who seeks protection. A deposit must be returned to that very man who kept it in deposit and in the same manner and state (in which it was deposited); it must not be delivered to one who claims propinquity to the depositor.

*' Nyāsaḥ ' means ' nikṣepa (deposit)'; ' pratyanantaraḥ ' means ' a near kinsman of the depositor. '[2] Manu (VIII. 191) says :

He who does not return a deposit or demands what he never deposited shall both be punished like a thief or should be made to give a fine equal to the thing bailed.

Bṛhaspati (p. 333 v. 11) says :

If the depositary (or bailee) were to allow the deposit to perish by making a difference (in the care bestowed upon it as compared with his own chattels) or by his indifference or were not to return it when requested to do so, he shall be made to pay it (its value) together with interest.

' Bhedaḥ ' means ' making a difference in the care bestowed upon one's own property (and on a deposit)'; therefore no blame attaches (to the depositary) if (the deposit) be destroyed through indifference together with the depositary's own goods.[3]

Yājñavalkya (II. 67) says ;

If the (bailee) of his own sweet will (i. e. without the bailor's consent)

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1. The terms nikṣepa, upanidhi and nyāsa are often used as synonyms, but were also differentiated in meaning. *Nikṣepa* is a deposit entrusted to a man in his presence after counting before him the coins &c. ; *upanidhi* is the deposit of articles enclosed in a sealed box or envelope (the articles not being counted in the presence of the depositee) ; a *nyāsa* is a deposit not made in the presence of the depositee but handed over to persons in his house for being given into his custody. Vide Vir. p. 361 (for all three) and Mit. on Yaj. II. 67 (for nyāsa and nikṣepa). Yāj. II. 65 defines upanidhi as done by the Mit. Manu VIII. 185 employs both terms, nikṣepa and upanidhi. Vide notes to Kāt. v. 592.

2. In Manu VIII. 185 the same rule and the word ' pratyanantara ' occur and Kullūka explains that while the depositor is alive it should not be returned to his son or any one else who would be the owner immediately after the depositor.

3. Compare this with section 151 of the Indian Contract Act.

* P. 191 (text).

makes a living (by the use of the deposit) he should be fined and made to return the deposit with interest.

' Ājīvan ' (in Yāj.) means ' subsisting by enjoying it, or by letting it out at interest; ' udayaḥ ' means ' interest '. Kātyāyana mentions a special rule about interest:

A deposit, the balance of interest, purchase and sale—these if not returned (or paid) when demanded bear interest at five per cent (per month).[1]

Manu (VIII. 192) says:

(The king) should inflict on a depositary who denies (or conceals) a deposit a fine equal to it (in value), specially so should the king (fine one) who conceals (or denies) an *upanidhi* (deposit of a sealed box &c.).

*Bṛhaspati (p. 333 v. 10) says:

If a deposit were to be destroyed together with the goods of the bailee through the adverse act of fate or the king, then no blame attaches (to the bailee).

Yājñavalkya (II. 66) says:

(The bailee) should not be made to return what was carried away (or lost) by fate, the king or thieves.[2]

Manu (VIII. 186) says:

A depositary who of his own accord returns (the deposit) to the nearest (relative) of the deceased (depositor) should not be proceeded against by the king nor by the relatives of the depositor.

' Pratyanantaraḥ ' means ' the nearest '. The meaning is that he (depositary) should not be proceeded against (or harassed) for more in the absence of evidence. Bṛhaspati (p. 334 v. 15) extends all these rules about *nikṣepa* to other matters also:

This same law is declared in the case of a bailment for delivery (to a a third person), a loan for use, an article delivered to an artisan (for being worked up), a pledge, a person who seeks protection.[3]

' Anvāhitam ' is that which is handed over to another person with the words ' so and so deposited it with me and you should deliver this to him '; ' yācitaka ' is an ornament or the like borrowed on the occasion of a marriage or the like for show; ' ś́ilpinyāsa ' means ' what is made over to a goldsmith or the like for being made into an ear-ring or the like '. Nārada (p. 123 v. 14) also says:

‡The same rules apply in the case of *yācita*, *anvāhita* and the like and in deposits with artisans, in nyāsa and pratinyāsa.

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1. This verse occurs above (text p. 169 and translation p. 190).

2. The mention of fate and the king is illustrative of every calamity that is irremediable or irresistible.

3. ' Bailment for delivery ' where A makes a deposit with B and B hands it over to C for being delivered to A, this is *anvāhita*. Vide Mit. on Yāj. II 67.

* P. 192 (text). ‡ P. 193 (text).

' Pratinyasaḥ ' is when the owner deposits with a person who redeposits it with another.[1] Kātyāyana ordains the restoration in certain cases of deposit made to an artisan even when it was destroyed by an act of fate or the king:

If an artisan agrees to work up a deposit in a definite number of days and keeps it with him beyond those days, he should be made to pay (the *price of*) *it even if it were gone* (*lost*) *through the act of fate.*[2]

Nārada (pp. 150--151 vv. 8-9) says:

Wearing apparel loses the eighth part of its value on being washed once (for the first time); the fourth part (on being washed) twice (for the second time); the third part (on being washed) for the third time and one-half on being washed for the fourth time. After one half of the original value is lost, one fourth of the value will be reduced in order (for each further washing)[3].

Yājñavalkya (II. 238) says:

A washerman on wearing the garments of another (handed to him for washing) shall be fined three paṇas and ten paṇas in cases of sale, hiring out, pledge, loan for use (without hire).

' Avakrayaḥ ' means ' delivery to another for hire '; ' ādhānam ' means ' making a pledge of it '. The same author (Yājñavalkya II. 178) states the rules about the reduction (of weight) in metals other than gold when they are heated in fire:

Gold is not reduced (in weight) by fire; in silver (the reduction) is two *palas* in a hundred; in tin and lead it is eight (palas in a hundred) and in copper it is five and in iron ten.

* In the case of reduction (in weight) of silver and the rest exceeding these (limits) the goldsmith and others are to be fined. The same author (Yāj. II. 179) declares a special rule, as to increase (in weight) in certain cases when yarn has been given for (being woven into) cloth:

In the case of woollen and cotton yarns the increase (in the weight) is ten *palas* in a hundered; in (cloth of) middling quality it is five palas (in one hundered palas); in (cloth of) fine quality it is declared to be three palas (in one hundered).

The same author (Yāj. II. 180) declares that there is a reduction (of weight in cloth) in certain cases:

A reduction of a thirtieth part is allowed in the case of cloth on which figures are drawn and of cloth embroidered with hair; there is neither reduction nor increase (of weight) in the case of silken cloth or bark cloth.

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1. According to the Mit. on Yāj. II. 67 ' pratinyāsa ' is a mutual deposit, both sides delivering articles for safe custody as occasion arises. The Mayūkha takes it in the sense of ' a deposit of a deposited article '.

2. Compare section 161 of the Indian Contract Act.

3. If clothes are washed only once and then lost by the washerman, he has to pay their price minus one-eighth.

* P. 194 (text).

'Kārmike' means 'in working figures of the *svastika* and the like with fine silken thread on cloth already woven.' If something was delivered to an artisan (for being worked up) and a time was fixed (at the end of which the finished article was to be delivered) and (the owner of the raw material) made a demand before the time fixed had elapsed, the artisan would not be liable even if the article were lost when not returned on demand. The same author declares this :

If an artisan (after the owner of raw materials made them over to him) for a particular purpose or after fixing a time (for delivery of the finished article) were requested (to return the materials) when the article was only half finished, he (the artisan) is not to be made to deliver the article or its price because (the finished article) was not obtained (through act of God or king).[1]

The reverse of this is laid down by the same author :

When the time (fixed) has elapsed and the purpose is served, if the artisan does not deliver it though requested, he would have to pay the price, if the article be destroyed or stolen.

* The same author says :

He who having taken a *yācitaka* (loan for use) does not deliver it even on demand should be restrained and forcibly made to return it and fined if he does not return.[2]

Here ends the section on deposits.

Now begins 'sale without ownership.'

Vyāsa says :

What is borrowed for use or what is entrusted to a man for being delivered to a third person or a deposit or the wealth of another that is stolen–when these are sold behind the back of the (true) owner, it is known as sale without ownership.[3]

Kātyāyana says :

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1. This and the following two verses ascribed to Yāj. here are not found in the printed text of Yāj. and are ascribed to Kātyāyana by other writers. The Sm. C. and Vir. hold that this verse and the next apply to yācitaka and explain them differently; vide notes to V. M. pp. 355--356. Compare section 159 and 160 of the Indian Contract Act.

2. The lender had not to resort to the several means of persuasion &c. as in the case of a debt; he could at once resort to *bala* and if the borrower did not deliver even then the king would fine him.

3. 'Sold'— this includes a gift and a mortgage.

* P. 195 (text)

A sale, gift or pledge made without ownership should be rescinded (or cancelled).[1]

' Asvāmi ' (in Kātyāyana) is a separate word and is an adverb. Nārada (pp. 144-45 vv. 2-3) says :

A purchase effected in public is blameless, (but) the purchaser incurs the charge of theft by purchasing clandestinely. If a man buys from a slave who is not authorised by his master (to sell), or from a rogue (a bad character), or in secret, or at a low price or at an improper time, he is as guilty as a thief.[2]

' Tad-doṣaḥ ' means ' the guilt of a thief '. Yājñavalkya (II. 171) says :

*Proof of the ownership of a thing lost (or stolen) must be given (by the owner) by means of title or possession; but otherwise on failure of such proof by him he should pay to the king a fine equal to a fifth part (of the property claimed).[3]

' Pañcabandhaḥ ' (in Yāj.) means ' a fifth share (of the price) of the thing lost '. When the witnesses adduced by the person claiming an article as lost by him depose contrary to his claim, Vyāsa prescribes a fine double of (the price of) the thing lost :

If the claimant does not establish by (the evidence of) witnesses that the thing sought (or claimed) by him is his, he should be made to pay a fine double (of the price of the thing) and the purchaser is entitled to (retain) the thing.[4]

The same author prescribes the course to be followed by the purchaser :

When the seller is produced, the purchaser should not in any way be proceeded against ; but it is ordained that there is to be litigation between the seller and the man claiming the thing as his own (and lost by him).[5]

Bṛhaspati (p. 335 v. 3) says :

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1. The Vir. regards ' asvāmivikraya ' as one word and dissolves it as ' asvāminā kṛtam vikrayam '. Vide Manu VIII. 199.

2. Compare Viṣṇu V. 164-166. ' From a slave '— this is only illustrative and includes minors and other dependents who have no authority to sell.

3. This applies to a case where A claims that he is the owner of a thing which he had lost or which had been stolen from him and which he finds in the hands of B who claims to be a bona fide purchaser from C. A, claiming to be the original owner, must prove his ownership by showing title (by purchase, partition &c.) or his previous possession and is spoken of as ' nāṣṭika ' in the texts. Manu X. 115 mentions seven general sources of title and Gautama six.

4. This prescribes a fine double of the price of the thing and the preceding verse only one-fifth. The heavier fine is meant for serious cases of false claims.

5. ' Mūla ' is a term applied to the seller when there is a claim made by another ma that the thing sold belonged to him and had been lost by him.

* P. 196 (text).

Where the seller pointed out (or produced by the purchaser) has been defeated in the lawsuit he should pay to the buyer and the king the price and a fine (respectively) and the thing (in dispute) to the owner.[1]

Kātyāyana says :

If the purchaser cannot point out (or produce) the seller, he should clear his purchase (as overt). Time for producing the seller should be given (to the purchaser) according to the extent of the distance. When he (the buyer) has cleared his purchase (as overt and so legal) he should not be blamed at all by the king. The claimant[2] should first establish by means of his kinsmen (as witnesses) that the thing (in dispute) was his. Afterwards the buyer should establish in order to clear himself his purchase (as overt and so bona fide) by (the testimony of) his kinsmen.

*Even if the purchaser proves the purchase (as overt), still the property does revert to the claimant to whom it belonged (and who had lost it). So says Manu (VIII. 202):

If the seller cannot be produced, the purchaser is let off by the king without fine and the person claiming the thing as his and lost by him gets it back when it is established to have been purchased openly.

' Anāhārya ' (in Manu) means ' not having pointed out (or produced) '. The meaning is ' the thing that is cleared by its being proved that the purchase was made openly. ' Kātyāyana says:

(A purchaser) who does not produce (or keep present before court) the seller or who does not establish the purchase (as overt) should be made to pay to the owner the price (of the article) as claimed in the plaint and a fine (to the king).

Bṛhaspati (p. 335 vv. 7-8) says:

When a purchase has been made before (i.e. to the knowledge of) a row of traders and to the knowledge of the king's officers, but the purchase is made from one whose habitation is not known or the vendor is dead, the real owner (of the thing thus sold away without title) will recover his chattel after paying half the price (to the purchaser); in such a case both (the real owner and the purchaser) lose a half on account of the popular usage (on such a point).[3]

Marīci says:

Where the vendor cannot be found because his dwelling place is unknown the loss should be assigned equally to both the purchaser and the claimant of the thing lost (by him).

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1. Compare Yāj. II. 170.

2. The ' claimant '— the person called ' nāṣṭika ' above.

3. Each is to be blamed to some extent, the purchaser for buying from a man whose habitation was unknown to him, the real owner for being careless enough to lose his property. ' Vyavahārataḥ ' may also mean ' in the judicial proceeding ' or ' according to the rules of law. '

* P. 197 (text.

' Nivesʹaḥ ' in (Marīci) means ' the residence of the vendor '. Nārada says :

One should enjoy what is permitted (by the real owner), whether women, cattle or land ; but he who enjoys without being offered (or permitted) should be made to pay the profit of such enjoyment.

*' Uddiṣṭam ' means ' permitted '; ' bhuktabhogam ' means ' hire (or profit) in accordance with the enjoyment '. Yājñavalkya (II. 173) says :

The owner of a thing that was lost or stolen and was brought to the king by the toll-gate keepers or by guards shall recover it (from the king) within one year; after that the king shall take it.[1]

As regards what Manu (VIII. 30) says :

The king should keep in his custody for three years property the owner of which has disappeared (or cannot be found); the owner can take it (at any time) within three years; beyond three years the king may retain it,

that refers to property of which a brāhmaṇa learned in the Vedas is the owner. The same author (Manu VIII. 33) says :

The king, remembering the righteous conduct of the good, should take a sixth, tenth or even a twelfth part of property which had been lost and was then found (by the king or his officers).[2]

Here in the first year (the king) should give up the whole of the property, in the second year he should take a twelfth share and then give up the property; in the third year a tenth part; in the fourth year and the rest a sixth. The words ' beyond (three years) the king should retain it ' are meant only to permit the disposal of the thing after three years if the owner does not come (within three years); if the owner comes, it must be restored to him even if disposed of. This is what the Mitākṣarā says. This, however, holds good only if the owner be unknown '; but when there is certain knowledge ' so and so went away forgetfully leaving this property ' then he‡ recovers it even after three years and the king also has no authority to dispose of it. But he may take a certain portion for himself (for safely keeping the articles). Yājñavalkya (II. 174) mentions the remuneration (or wages) for guarding for a day animals belonging to another that were found straying :

(The owner of straying animals) should pay four paṇas if the animal be of the species with single hoofs, five for human beings, two paṇas for a buffalo, camel and cow and one fourth of a paṇa for goats and sheep.

But what was consumed by them must be paid for besides (the above).

On a treasure being found Yājñavalkya (II. 34-35) says :

1, Compare Gautama X. 36-38.

2. Various explanations are given as to when a sixth, tenth or twelfth share was to be taken. Vide notes to V. M. p. 361.

* P. 198 (text). ‡ P. 199 (text).

The king having himself found a treasure[1] should give half of it to brāhmaṇas; but a brāhmaṇa (finding treasure), if learned should take (appropriate to himself) the whole, since he (learned brāhmaṇa) is master of everything. When a treasure is found by anyone else, the king should take a sixth part of it;[2] one who does not inform the king of the find should be made to restore (the treasure to the king) and also pay a fine.[3]

But when anyone proves by some distinctive mark or weight or otherwise that the treasure (found) is his, then the king should deliver it to him after giving a twelfth part to the finder and after taking a sixth for himself; as Manu (VIII. 35) says:

When a man avers truthfully and says ' this is mine ', the king should take a sixth share from him and a twelfth also.

*The twelfth share is for the finder. On the subject of property stolen by thieves the same author (Manu VIII. 40) says:

Property stolen by thieves must be restored by the king to the owner to whatever *varṇa* he may belong; if the king appropriates it to his use he incurs the sin of the thief.[4]

Where the king is unable to recover property (from thieves) Kṛṣṇa-Dvaipāyana (Vyāsa) says:

If unable to recover property stolen by thieves, the king when so powerless shall make it good from his own treasury.[5]

Here ends the discourse on sale without ownership.

Now begins the section on joint undertakings (or concerns).

Nārada (p. 124 v. 1) says:

Where traders and others carry on business (or transactions) jointly, that is declared to be a joint concern, which is a title of law.

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1. Nidhi means a treasure buried in the earth. Compare Manu VIII. 37 for a proposition similar to ' he is master of everything. '

2. The Mit. interprets this part differently as ' the king should give a sixth part to the finder ' (other than a brāhmaṇa or king) and keep the rest for himself. The Mit. quotes Vasiṣṭha III. 13 in support. Vide Gautama X. 43-45. The interpretation in the text is more natural and follows Aparārka.

3. Compare the Indian Treasure Trove Act (VI of 1878) sections 4, 10-12, 20 with these rules.

4. Compare Yāj. II. 36, Gautama X. 46, Viṣṇu III. 66.

5. Compare Gautama X. 47, Viṣṇu III. 67.

* P. 200 (text).

Bṛhaspati (p. 337 vv. 5-7) says:

If one out of many (partners), being authorised by all, gives property (i.e. enters into transactions of sale &c. with others) or causes a document to be executed, it will be deemed to be done by all[1]. In matters of doubt and in (cases of discovery of) fraud they are declared to be the arbitrators and witnesses among themselves, provided they are not affectd by enmity (among themselves). When anyone of them (partners) is found out to have practised fraud in sales and purchases (for the partnership) he must be cleared by oaths (and ordeals). This is the rule in all disputes (of this sort).

*Yājñavalkya (II. 265 and 260) says :

They should expel a crooked (fraudulent) partner without giving him any profit; one (partner) who is unable (personally to do work) should cause the partnership work to be done by another. If a loss be caused (to the partnership) because one did what was forbidden or did something without being asked to do so or through one's negligence he should make good that loss; that partner who saves (partnership property) from destruction is entitled to (an additional) one tenth share (as his reward).

Kātyāyana says:

If artisans (of four kinds be jointly employed) viz. young apprentices, those who have studied the craft, those who are adepts in it and those who are teachers, —they shall receive one after another in order one, two, three or four shares (of the profits of the undertaking).

' S'iṣyakāḥ ' means ' apprentices '; ' abhijñāḥ ' means ' those who know the craft '; ' kus'alāḥ ' means ' experts '; ' ācāryāḥ ' means ' those who introduce new methods '. Bṛhaspati (p. 341 v. 29) says:

The headman among a number of workmen jointly building a mansion or temple or making utensils required for religious worship is entitled to two shares.[2]

The same author (Bṛhaspati p.341 v. 30) says:

The same rules have been declared by the good for dancers; but one who beats the tune (while others sing or dance) gets half a share while the singers get equal shares (with the dancers).[3]

1. Compare section 251 of the Indian Contract Act.

2. ' Two shares ' — The headman gets as wages double of what other workmen get. The reading ' cārmikopaskarāṇi ' (articles of leather) is bad, particularly when it has to be placed in juxtaposition to temples.

3. The chief dancer gets two shares like the chief among builders.

* P. 201 (text).

Kātyāyana says :[1]

If any one from among them while they are scattered about (for pillage) is caught, then* they should contribute (or bear) according to their shares towards the payment of the ransom for securing his release. This is the settled rule as regards all that engage in (a joint) undertaking without (previously) defining their shares, such as traders, husbandmen, thieves or artisans.

Here ends the section on joint undertakings.

Now begins (the section on) resumption of gifts.

Nārada (p. 128. v. 1) says :

Where a man wishes to resume what he has improperly given, that is a title of law called Dattāpradānika.

' Asamyak ' (in Nārada) is an adverb and means ' in a way that is forbidden '. The same auther (Nārada p. 128 vv. 2, 4, 5) says :

What may be given and what may not be given, valid gifts and invalid gifts — in judicial matters, the law of gifts is said to be thus fourfold. An *anvāhita*, a *yācitaka* (loan for use), a pledge, joint property, a deposit, son and wife, the whole property of one who has offspring and what has been already promised to another man-these have been declared by the (ancient) teachers to be inalienable (to be not proper subjects of gift).[2]

Here as a man has no property over the series of objects ending with son and wife, the express prohibition of a gift with reference to them is mere anuvāda (a laudatory or condemnatory re-iteration) as in the case of the Vedic text ' neither in middle regions nor in the heavens[3] '. This explanation

1. Nīlakaṇṭha introduces these verses rather abruptly. In other works there are two verses preceding the first verse quoted, which say that if certain adventurous spirits plunder the territory of an enemy king at the bidding of their king, they should give one-tenth of the booty to the king and divide the rest, that the head of the plundering party should get four shares, the intrepid ones three shares, the strong ones two and the rest one share each.

2. The words ' anvāhitā , yācitaka, ādhi and nikṣepa ' have already been explained; ' son and wife'—these must be regarded as one item. Nārada (p. 128 v. 3) says that what may not be given is eight-fold. A person is not an absolute owner of what is anvāhita with him or of yācitaka, of a pledge, deposit or of property jointly owned with others or of son and wife.

3. One cannot make a gift of what one does not own. Nīlakaṇṭha established above (text p.92 and tr. p.83) that there is no ownership in wife and son. Therefore the six objects ending with son and wife in Nārada could not be gifted away. But Nārada does say that they are '*adeya*' (using the potential passive participal). This is not a prohibition (niṣedha) properly so called, for a prohibition is made about something that might, in the absence of the prohibition, follow as a matter of course. There being no ownership in the six things and it being well-known that a gift can be made only of that which is owned by one, it is not necessary to prohibit. Therefore this is not a proper *niṣedha*. These words

* P. 202 (text).

also explains the *paryudāsa* (proviso) contained in the text of Yājñavalkya (II. 175) 'a man may give anything that does not cause detriment to one's family, except[1] wife and son. ' The absence* of ownership in son and wife has been already propounded in the discussion on ownership (p. 83 above). 'In making a gift of these (that are mentioned in Nārada) not only will the gift be invalid in law, but the man will be liable to undergo an expiatory penance, as Dakṣa says with reference to these :

That foolish man who makes a gift of these incurs the penalty of expiatory penance.

Manu says :

He who receives what may not be given and he who gives what may not be given-both of them should be punished like a thief and should be[1]

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only repeat what is already well-known, that is, they are merely an *anuvāda* (which is a variety of arthavāda). Nīlakaṇṭha cites a Vedic example of a negative clause being only an *anuvāda* and not a *niṣedha* properly so called. In Tai. S. V. 2. 7 we have a sentence " The brahmavādins say ' fire should not be kindled on the bare ground, nor in the middle regions nor in the heavens'. " The rule about *agnicayana* is that fire is to be kindled on gold and not on bare ground. It is not possible to kindle fire in the middle ragions nor in the heavens; therefore this prohibitory passage (*nāntarikṣe na divi*) does not forbid what possibly might be done. These words contain only an arthavāda (of tha anuvāda variety) and serve to belaud the kindling of fire on gold and censure kindling on bare ground. This text is dealt with in Jaimini I. 2. 5 and X. 8. 7. Vide notes to V. M. pp. 367-368 for further explanation. An *arthavāda* has three varieties; ' virodhe guṇavādaḥ syād--ānuvādoSvadhārite । bhūtārthavādas-tad--dhānād---arthavādās--tridhā mataḥ ' ॥. When it is said 'Ādityo yūpaḥ ' (the sun is the sacrificial post) it is an example of guṇavāda as this is opposed to our perception, but the sentence has only a secondary sense (viz. that both Āditya and yūpa are brilliant). When it is said ' agnir-himasya bheṣajam ' (fire is an antidote to cold) it expresses what is well-known from the experience of our senses. So this is *anuvāda*. When it is said ' Indra killed Vṛtra, ' it is bhūtārthavāda since it is not opposed to any pramāṇa, nor is it known from any pramāṇa; it only narrates a story.

1. When the negative particle ' na ' is employed in a passage the question often arises as to its exact import. In some cases it has the sense of pratiṣedha (prohibition), as in ' he does not take the ṣoḍaśi cup in Atirātra sacrifice '. Sometimes ' na ' has the sense of an arthavāda, as in ' neither in the middle regions nor in the sky ' discussed above. In some cases ' na ' has the sense of ' paryudāsa ' (an exception or proviso). A Vedic example is ' the snātaka should not see the rising sun, ' which passage is preceded by the words ' *tasya vratam* ' (his observances). An observance is something positive; therefore ' he should not see &c. ' does not prohibit the seeing of the rising sun, but only enjoins that he should make a resolve not to see the rising sun Yājñavalkya's rule is ' what a man owns may be given. ' The words ' except son and wife ' constitute an exception. Just as in Nārada's verses ' anvāhitam &c. ' several things are declared to be *adeya* though over the first six of them there is no ownership (and so the negative particle is construed as an anuvāda), so Yaj. excludes son and wife from *deya* things though they are not of the same nature as other things (over which there is ownership). This is the idea conveyed by the words ' this explanation also explains &c.).' Vide notes to V. M. pp. 369-370 for detailed explanation. Dakṣa enumerates nine things as *adeya*.

* P. 203 (text).

made to pay the highest amercement.[1]

What may be given is thus declared by Bṛhaspati (p. 342 v. 3) :

What remains after (providing) for the food and clothing of the family may be given.

Kātyāyana declares what must be given (without fail):

He who, having voluntarily promised a gift to a brāhmaṇa, does not deliver it should be compelled to give it as if it were a debt and should be fined the first amercement.

Gautama (V. 21) says ' one should not give, even after promising to give, to a man who does what is forbidden ' (by the s'āstras). Vyāsa forbids the gift or sale of means of livelihood :[2]

Those who are born and those who are yet to be born and those who are in the womb wish for means of livelihood ; so no gift nor sale (of vṛtti) can be effected).

Nārada (pp. 128-129 vv. 3 and 8.) sets out the various kinds of valid and void gifts :

*Of valid gifts there are seven varieties and invalid gifts are of sixteen varieties. The price paid for goods, wages, what is paid for pleasure (from dancers or bards), a gift through affection, a gift from gratitude, a gift to a bride's kinsmen and gifts for charitable purposes-these are known as valid gifts by those who have knowledge of gifts.

' Anugraha ' means ' dharma ' (religious and charitable purposes). Nārada (pp. 129-130 vv. 9-11) says :

Invalid gifts are (sixteen) as follows : What has been given by men under the influence (or pressure) of fear, anger, pangs of sorrow, or as a bribe or in jest, or under misapprehension (as to person or thing), or through fraud, or given by a child or by a fool or by one who is not his own master, by one who is distressed, by one intoxicated, by one who is insane; or what is given from the desire of a reward thinking ' this man will do me some good turn '; what is given through ignorance to an undeserving person because it was proclaimed that he was a worthy person, what is given for a purpose which is really sinful (though thought to be meritorious)—all these are known to be invalid gifts.[3]

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1. Manu VIII. 138 lays down 1000 paṇas as the highest amercement, 500 as middle and 250 as first; and Yāj. I. 366 prescribes 1080 as the highest fine, half of it as middling and quarter of it as first or lowest.

2. ' Adharmasaṁyukta ' in Gautama means one who is guilty of visiting a prostitute and such other censurable conduct. ' Vṛtti ' — Mandlik takes it in the modern sense of ' a religious office such as that of a village priest ' by which a man makes his livelihood ; but it is not necessary to do so.

3. In *Javerbai* v. *Kablibai* 15 Bom. 326 at p. 336 it was said that Nīlakaṇṭha does not place a conditional gift amongst those which are essentially void and that in the works of other Hindu writers the word ' upādhi ' usually implies fraud and not merely condition. With the last two in Nārada compare Manu VIII. 212.

* P. 204 (text).

'Ruk' means 'pain'. The construction is 'by those who are under the influence of pain caused by fear and the rest' i. e. the meaning is 'given by one who was oppressed by the fear of being beaten &c'; in the same way what was given (to others) through anger against brothers with the idea that loss may be caused; 'vyatyāsaḥ' is when a man intending to give silver gives gold through mistake: 'chalayogataḥ' occurs when (for example) knowing that a king wanted to give a cow to Devadatta it was given to another who dressed himself like Devadatta, even though the recipient was a worthy man; 'ārtaḥ' means 'one whose mind is restless through disease'; 'mattaḥ' means 'intoxicated by some intoxicating drug'; 'unmattaḥ' means affected by wind (delirium); 'apavarjitam' means 'given': what was given with the thought 'he would do me a good turn' to one who does not do it; what was given with the idea that one (the donee) will employ it for religious purposes but who employs it for sinful purposes. These (gifts) return (to the donor). Kātyāyana says:

* What is given through lust or wrath or by those who are dependent, by those distressed, by those frightened, by lunatics or by those who are infatuated, or what was given for avoiding (the consequences of) lapses (from the right path)—these may be taken back.[1]

'Kāmāt' means 'for seducing the wife of another'; 'klibaḥ' means 'one frightened'; the meaning of 'vyatyāsa.........dattam' is bribe.

What is promised as a bribe to a man for accomplishing a certain object need never be given even though the object be accomplished. If the bribe were given before (the object was accomplished), it should be returned by force (to the giver) and a fine eleven times as much (as the bribe) should be levied. This is what the followers of Garga and Manu say.[2]

The same author (Kātyāyana) describes the nature of a bribe:

That is* said to be *utkoca* (a bribe) which is obtained by these, viz. by giving information about a theft, about a felon, about one who breaks the rules of decent conduct, about an adulterer, by pointing out those who are of bad character, by spreading false reports about a person.[3]

Manu (VIII. 165) says:

A fraudulent mortgage or sale, a fraudulent gift or acceptance and everything else wherever (the king or judge) finds deceit-all these he should declare to be void.

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1. Compare Gautama V. 22 and Bṛ. p. 343 vv. 9-10.

2. These two verses are quoted in *Shri Sitaram* v. *Shri Harihar* 35 Bom. 169 at p. 180 where it was held that if an adoption was induced by a bribe given to a widow, the bribe was an illegal payment and cannot support a sale or gift.

3. 'Giving information about a theft' — either suppressing information about a person who is really a thief or threatening a person that he would be reported as a thief.

* P. 205 (text).

* ' Yoga ' means ' fraud '; ' yasya ' means ' in whatever other transaction '. The meaning is that ' all that returns (to the donor) when the fraud vanishes (i. e. is detected) '. Kātyāyana says :[1]

If a gift was promised by a man for a religious purpose whether when in good health or when afflicted with disease, the son should be made to pay it, if the father (the promisor) dies without actually handing it over; there is no doubt on this point.

Further elucidation on this point will be found in my revered father's Dvaitanirṇaya.

Here ends (the section on) resumption of gifts.

Now begins (the section on) the breach of a contract of service.

Nārada (p. 131 v. 1) says :

When a man having agreed to serve does not carry out the agreement, it is termed a breach of the contract of service, a title of law.

Bṛhaspati (p. 345 v. 10) says that servants are of three kinds :

The armed fighter is declared to be highest, the cultivator the middling one, the porter is declared to be the lowest and so is (a servant) employed in household work.[2]

Nārada (p. 135 v. 24) says :

One who is appointed over all (servants) and (to supervise) over the household should also be regarded as a labourer and he is known to be

1. It was said above that a gift by one who is ' ārta ' is void; an exception to that is stated in this verse. The only cases where an incomplete gift not actually made but remaining only in promise was enforced by the courts in ancient India are a gift promised to a brāhmaṇa (vide Kātyāyana quoted above on p. 233) and a gift for a religious purpose. This verse contains the germ of the idea of a will since here the mere declaration of the intention of a man to give for religious purposes is made enforceable after his death. In modern times a mere gift for *dharma* without specifying any particular object is declared to be void for uncertainty. Vide 6 Bom. 24, 14 Bom. 482, 17 Bom. 351, 18 Bom. 136, 22 Bom., 725 (P. C.) at p. 735 (= 26 I. A 71). But this is opposed, as pointed out in 30 Mad. 340 to the spirit of ancient Hindu Law. Vide Manu IV. 227 for *dharma* meaning 'iṣṭa' (religious purposes) and ' pūrta ' (charitable purposes). This text of Kātyāyana is the basis of the Hindu Law of religious Trusts. Vide *Ghelabhai* v. *Uderam* 36 Bom. 29 at p. 35 (where the verse is quoted) and *Bhupati Nath* v. *Ram Lal* 37 Cal. 128 (F. B.) at p. 137 (where also Kāt. is quoted). In many of the earliar reported cases it was laid down as a general proposition that under Hindu Law a gift was invalid without possession. Vide 4 Bom. H. C. R. (A. C. J.) p. 31, 10 Bom. H. C. R. 431. But since *Kalidas* v. *Kanhaya Lal* L. R. 11 I. A. 218 it has been held that possession is not absolutely necessary to constitute a valid gift under Hindu Law. In *Bhaskar* v. *Sarasvatibai* 17 Bom. 486 (at p. 491) it is said (approving Mayne) that Hindu Law properly so called appears to ay little stress on any such rule as applicable to gifts.

2. Compare Nār. p. 134 v. 23 for the same three classes and examples.

* P. 206 (text).

kauṭumbika (the general family servant).

Kātyāyana says :

According to Bhṛgu, one who is free, by giving himself (to another), becomes a slave like a wife.[1] Slavery should be known as limited to three varṇas (classes), in no case can a brāhmaṇa become a slave. *Slavery of men of the kṣatriya, vais'ya and s'ūdra classes, who give up their freedom, is to be in the descending order of the classes and not in the inverse order.[2]

Nārada (p. 137 v. 39) says :

Slavery is not ordained in the inverse order of the (four classes).[3]

Kātyāyana says :

Where the three twice-born classes are fallen from the order of ascetics, there (the king) should banish a brāhmaṇa (apostate) and a kṣatriya (apostate) should be reduced to slavery. This is the view of Bhṛgu.

The mention of ' kṣatra ' (in Kātyāyana) is intended to include the vais'ya and s'ūdra also.[4] Dakṣa and Nārada describe the method of banishing a brāhmaṇa :

He who, having entered the order of asceticism, does not abide by the peculiar duties of that order should be instantly banished by the king after having branded on his skin the mark of dog's foot.

Kātyāyana says :

A brāhmaṇa should not be made a slave even to a brāhmaṇa. But a brāhmaṇa may, if he so desires, do work for another brāhmaṇa who is possessed of good character and Vedic learning and to whom he is inferior (in these respects). But even then a brāhmaṇa should not do impure

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1. Just as a woman by rendering up her person to her husband as his wife becomes his dependent, so when a free man offers himself as belonging to another, he becomes a slave.

2. The first half is the same as Yāj. II. 183 (latter half). A kṣatriya, vais'ya or s'ūdra can be the slave of a brāhmaṇa, a vais'ya or s'ūdra can be the slave of a kṣatriya and a s'ūdra of the vais'ya.

3. The latter half of this verse is ' except where a man violates the duties peculiar to his class and status. Slavery is like the condition of a wife '. A brāhmaṇa could marry a girl of his own or of any of the three other classes ; so a kṣatriya or vais'ya could be the slave of a brāhmaṇa ; but just as a ksatriya or vais'ya male could not have as his wife a girl of a higher class, so a man of a higher class could not be the slave of one of a lower class. Nārada says generally that a man who violates the duties of his caste may become the slave of one of a lower caste, while Yāj. II. 183 restricts this general rule by saying that one who is an apostate from sannyāsa (even though a brāhmaṇa) becomes the slave of the king alone; but Kātyāyana prescribes that a brāhmaṇa apostate from sannyāsa should be banished and any one of the other classes should be made a slave of the king.

4. This note of Nīlakaṇṭha shows that he held that even s'ūdras could go into the order of *sannyāsa*. But the trend of the dharmasūtras and other ancient authorities is that a s'ūdra could not be a sannyāsin. Vide 39 Bom. 168 at p. 174 where it was assumed that *sannyasis* are confined to the three higher castes.

* P. 207 (text).

work (even for a learned brāhmaṇa).[1]

Manu (VIII. 411) says :

*A brāhmaṇa should support without harshness a kṣatriya or a vaiśya distressed for his livelihood; he should make them do work (befitting them) if they were their own masters.

' Svāmikarma ' means ' work of a higher kind suited to their caste
Kātyāyana says :

He who takes a brāhmaṇa woman and also he who sells her should be fined by the king who should make that transaction (of sale and purchase) null and void. He who enslaves a woman of a respectable family that took shelter with him at her pleasure (or through lust) or who transfers her to another shall be punished and his act shall be annulled. He who enjoys the nurse of his child or one who is not a nurse or the wife of his attendant as if she were a female slave would incur the lowest amercement.

Viṣṇu (V. 151) says : ' one who employs a man of a higher caste as a slave shall be fined in the highest amercement. '[2] Kātyāyana says ;

He who wishes to sell a female slave faithful to him who cries (when about to be sold), being able and not in any difficulty, would incur the lowest amercement.

Nārada (pp. 135-137 vv. 26-29, 37, 30) describes the varieties of slaves :

One born at (his master's) house, one purchased (for money), one received (by gift and the like), one obtained by inheritance, one maintained during a famine, one pledged by his master, one† released from a heavy debt, one made captive in a fight, one won through a wager, one who approaches saying ' I am thine ', one fallen from asceticism, one enslaved for a stipulated period, one who becomes a slave for maintenance, one enslaved on account of connection with a female slave, one sold by himself–these are the fifteen classes of slaves declared in the śāstras. Among these the group of the first four cannot be released from slavery except by the favour of their masters ; their bondage is hereditary. That wretched man who, being free, sells himself is the vilest of these (fifteen varieties). He also cannot be released from bondage. He out of these (fifteen), who saves his master from danger to life, would be free from the state of

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1. Nārada (p. 131. vv. 5-7) divides work into pure and impure and says that pure work is done by labourers and impure by slaves and then sets out impure work as ' sweeping the gateway, the privy, the road and the place for rubbish, shampooing private parts &c'.

2. This may refer to a brāhmaṇa being made a slave or to the fact of a man of a lower class employing as a slave one of a higher class.

* P. 208 (text). † P. 209 (text).

slavery and shall get a son's share (out of his master's wealth).[1]
Yājñavalkya (II. 183) says:

He who falls from asceticism becomes the king's slave for life.[2]

Nārada (pp. 136-137 vv. 31-34) says:

One maintained in a famine is released from bondage if he gives a pair of oxen. A slave who is pledged becomes free (from pledgee's slavery) when his master redeems him by paying off the debt. A debtor is freed from slavery by paying his debt with interest. One who approaches saying 'I am thine', one made a prisoner in war and one won in a wager—these are released on giving a substitute who will do some work.[3] A slave for a stipulated period gets release on the expiry of the time fixed. *The slave for maintenance is released at once from the moment the master ceases to give him food. One enslaved on account of (connection with) a female slave is released on parting from her.

'Pratiśīrṣaḥ' means 'a substitute'. 'Vaḍavā' means 'a female slave'.
Yājñavalkya (II. 182) says:

One who is forcibly made a slave and who is sold as a slave by robbers is released (by the king if the master does not release him).[4]

Nārada (p. 138 v. 40) says:

If one who is not free offers himself as a slave (to another) saying 'I am thine', the slave would not secure his desire, but the former master can recover him.

'Asvatantraḥ' means 'the slave of another'. In this section, the masculine gender of the word 'dāsa' being not intended (to be strictly taken), it should be understood that all these rules apply to a female slave also. Kātyāyana states a reason for enfranchising a female slave:

He, who has intercourse with his female slave who bears issue to him in consequence, should make her together with her offspring free from slavery having regard to the seed.

'Bījam' means 'child'; the meaning is 'considering the fact of the child being of good qualities'.[5] Nārada (p. 138 vv. 42-43) says:

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1. 'One born at his master's house'— means 'born from a female slave of the master.' He is otherwise called 'garbhadāsa'. 'Bhaktadāsaḥ' means one who says "I shall be your slave till I shall pay off the price of the food I have eaten" or one who says 'I shall be your slave as long as you give me food.' 'Who saves his mastar &c.'—The Mit. on Yāj. II. 182 says 'when he saves his master attacked by robbers or a tiger'. 'One enslaved...... female slave'— means 'one who being in love with a female slave marries her and enters the household as a slave.'

2. That is, he could not be a free man by the favour of his master or by imperilling his life for saving his master.

3. The reading 'tulyakarmaṇā' is much better. It means 'a substitute who is able to do as much work as these slaves'.

4. Compare Nār. p. 137 v. 38.

5. Vide notes to V. M. p. 380 for other explanations.

* P. 210 (text).

One who, being pleased in his mind, desires to emancipate his own slave should take from his (the slave's) shoulders a jar filled with water and smash it to pieces. He should sprinkle his (slave's) head with the water containing whole grain and flowers and having declared thrice ' you are not a slave ' he should dismiss him with his face turned towards the east. *Thenceforward he should be spoken of as ' svāmyanugrahapālitaḥ ' ; the master may partake of food cooked by him and presents may be accepted from him and he becomes respected by the good.[1]

Kātyāyana says :

A female who is not a slave, if married by a slave, would also be a slave, for her husbund is her lord and the lord is dependent on his master. Of the wealth that belongs to a slave the master of the slave is regarded to be the owner.[2]

Thus ends (the section on) breach of contract of service.

Now begins (the section on) non-payment of wages.

Nārada (p. 139 v. 1) says :

A series of rules for payment and non-payment of the wages of labourers is declared (hereafter); that is known to be the title of law called ' non-payment of wages '.

Yājñavalkya (II. 194) says :

He who without settling the wages to be paid causes work (to be done) should be made by the king to pay a tenth part (of the profits) of trade, cattle or crop.

This refers to light work. As regards heavy work Bṛhaspati (p 345 vv. 12-13) says :

A cultivator of the soil should take a third or fifth part (of the produce) ; a cultivator to whom food and clothing are given should take a fifth part of (the crop raised by) his plough ; while one who is not so provided should take a third part of the crop produced.

' Bhaktācchādabhṛtaḥ ' means ' maintained by giving food and raiment. '

¶Nārada (p. 140 v. 5) says :

He who does not perform work that he has promised to do should be

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1. ' Vaktavyaḥ &c. '— this would also mean ' he should be addressed as an equal by his former master ' ; ' svāmyanugrahapālitaḥ ' would then mean ' being saved by the favour of his master '. ' Pratigrāhyaḥ ' would ordinarily mean ' presents may be made to him '.

2. As to this last compare Manu VIII. 416 and Nār. p. 138 v. 41 which prescribe that whatever a wife, a slave or a son may acquire shall belong to him to whom they belong. The V. C. and V. R. add a half-verse, which says that what a slave gets by selling himself and whatever he gets as a a gift from his master through favour do not belong to the master.

* P. 211 (text). ¶ P. 212 (text).

compelled to do it after giving him the wages. If he does not perform it after having taken wages, he would incur liability to pay back twice the wages.[1]

Manu (VIII. 215) says :

A hired workman, who, without being ill, does not perform through insolence work as agreed upon, should be fined eight kṛṣṇalas and no wages should be paid to him.[2]

The same author (Manu VIII. 217 and 216) says :

He, who whether well or ill does not perform the work as agreed, shall have no wages paid to him though the work left unperformed be only a small part. But a labourer who was ill may when he becomes well perform his work as at first agreed upon and would get his proper wages even after the lapse of a long time.

Viṣṇu (V. 153–154) says: 'A hired labourer leaving off work before the stipulated period expires shall forfeit the whole price of his labour and should pay to the king a hundred paṇas '. The same author (Viṣṇu V. 157–159) says: ' If the master dismiss the servant before the expiry of the stipulated period he shall pay to the servant his whole wages and a hundred paṇas to the king, except in cases where the servant is to blame.'[3] Vṛddha-Manu says :

A servant should be made to pay the value of what he lost through carelessness and twice the value of what he lost through hatred (of the master), but he should not be made to pay anything for what was stolen by thieves, nor for what was burnt, nor for what was carried away by water.

*' Drohaḥ ' means ' hatred '; ' Ūḍham ' means ' carried away '.

Yājñavalkya (II. 197--198) says:

One who causes an obstacle (by refusal to work) just at the (auspicious) time of starting should be made to pay twice the wages; if (he causes obstacle) after starting he should be made to pay a seventh part; but the fourth part if he leaves off on the way.

Vṛddha-Manu says :

If a merchant dismisses the servant on part of the journey after selling the merchandise, he (the servant) too must be paid, but he shall receive half the wages.

Kātyāyana says :

If the goods be detained or seized on the way, he (the servant) would obtain wages in proportion to the distance traversed. That master who

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1. Compare Yāj. II. 193.

2. A kṛṣṇala (otherwise called *raktikā*) is a little less than two grains. Five kṛṣṇalas made one māṣa and 16 māṣas made a suvarṇa, but two kṛṣṇalas made a māṣa of silver. Vide Manu VIII. 134-135 and Yāj. I. 362-363.

3. The fault of the servant must be theft and the like and not eating large quantities of food &c.

* P. 218 (text).

deserts on the way his servant who is helpless, tired or afflicted with disease will incur the first amercement, if he does not wait for three days in the village (after the servant gets ill).

'Āsiddhyeta ' means ' is detained or attached by the king's order '. Bṛhaspati (p. 346 vv. 17-18) says :

When a servant being enjoined by the master (to do something) does an improper act (such as theft) for the master's benefit the master shall be held responsible for it. That master who does not pay the wages of labour even after the work is finished shall be compelled by the king to pay it and also a proportionate fine.[1]

Nārada (p. 141 v. 7) says :

(A merchant) who after having hired vehicles and beasts of burden does not carry his merchandise by means of them shall be made to pay a fourth part of the hire, and the whole hire if he leaves them half way.

* ' Yānam ' means ' chariot and the like '; ' vāhanam ' means ' direct vehicles such as horses '. Kātyāyana says :

He who having hired elephants, horses, bullocks, asses, camels and the like does not return them when his object is fulfilled shall be made to pay (the hire) till he returns them.

Nārada (p. 143 vv. 20-21) says :

If a man builds a house on the land of another and lives in it paying rent (for the land), he may take with him when he leaves it the thatch, the timber, the bricks and the like (building materials). But if he has resided on the ground of another without paying rent and without any definite agreement, he shall, when he leaves the house, make over to the owner of the ground, the thatch and the timber and the bricks laid (as walls).

' Stomaḥ ' means ' hire '.

Here ends (the section on) non-payment of wages.

Now begins (the section on) transgression of conventions.

Nārada (p. 153 v. 1) says :

The established conventions (or rules) among heretics, *naigamas* and the like are styled *samaya* (compact, usage). That is known to be a title of law called ' non-violation of conventions '.[2]

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1. It is better to read ' vinayam ' for ' vetanam '.

2. ' Samayānapākarma '— Anapākarma is used in Manu VIII. 4 with reference to ' gifts ' and ' anapakriyā ' which is similar to ' anapākarma ' in derivation is used with reference to gifts and wages in Manu VIII. 214. Nārada has ' vetanasyānapākarma ' and ' samayasyānapākarma '. It is difficult to give an exact rendering of anapākarma '.

* P. 214 (text).

* 'Pākhaṇḍinaḥ' means 'persons engaged in trade who are opposed to the path laid down by the Vedas'; 'naigamāḥ' are those (traders) who are not opposed to the Veda; by the word 'ādi' persons learned in the three Vedas are included. Bṛhaspati (pp. 346-347 vv. 2-3) declares the duty of the king in these matters.

> (The king) should bring and establish there (in his kingdom) brāhmaṇas proficient in the Vedas and lores, learned brāhmaṇas and those who keep sacrificial fires and should assign to them means of livelihood. He should donate to them houses and lands from which no taxes are levied, having declared in a grant of his that they would be free from liability to pay in future (the king's dues on land cultivated by them).[1]

'Anāchedyakarāḥ' means 'on which taxes are not levied'. 'Muktabhāvyāḥ' means 'the future (share of the king in the) produce from the soil of which is given up'. Yājñavalkya (II. 186) thus speaks about the peculiar rules of learned brāhmaṇas and the like:

> Whatever rules are established by the king or by local conventions should be assiduously observed (by the learned brāhmaṇas and others) so far as they are not in conflict with their duties (as laid down in their sacred books).[2]

Nārada (p. 153 v. 2) says:

> Among heretics, among *naigamas*, guilds, corporations, groups and assemblages, the king must maintain the conventions (settled) among them, in fortified places as well as in the open country also.

'S'reṇis' are communities of persons of various castes carrying on one kind of trade or business; 'pūgāḥ' are communities of the same (i. e. of persons of different castes) carrying on different kinds of trades; 'vrātas' are assemblages of kinsmen, relatives and cognates; they are also

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'Saṁvid' means 'a settled convention or usage' and 'vyatikrama' means 'transgression'. So 'saṁvidvyatikrama' is another name of 'samayasyānapākarma'. Manu (VIII. 5) and Yāj. employ the title 'saṁvid-vyatikrama' while Bṛ. employs the word 'samayātikrama'. 'Heretics' are Bauddhas and Jainas who deny the authority of the Vedas. 'Naigama' ordinarily means 'a trader'. Kātyāyana as quoted in V. R. (p. 668) defines 'naigama' as a 'group of citizens'. The Mit. on Yāj. (II. 192) explains 'naigama' as 'Pās'upatas and others who regard the Vedas as authoritative' (here the word is derived from 'nigama' meaning 'Veda').

1. Āp. Dh. S. II. 10. 26. 10, Manu VII. 133 exempt a learned brāhmaṇa from taxation and Manu VII. 135 calls upon a king to assign means of livelihood to *śrotriyas.*

2. Aparārka and Sm. C. give examples of 'conventional rules'. Vide notes to V. M. p. 386. Some examples are: 'old *prapās* and temples should be repaired, poor people should be supported; when there is trouble from thieves, one man from each house should come forward for defence &c.' In the Peheva inscription from the temple of Garibnath (Epi. Ind. Vol. I. p. 184,) we find that pious horse-dealers at Pehova agreed to impose upon themselves and their customers certain tithes, the proceeds of which were to be distributed among certain temples and priests. As examples of rules by the king are mentioned 'horses should not be sent to the enemy's country, food should be given to all travellers'.

* P. 215 (text).

termed 'kulas'; 'pākhaṇḍins' and 'naigamas' have* been already explained.[1] 'Gaṇas' are the assemblages of these beginning with heretics and ending with 'vrātas'. Yājñavalkya (II. 187) prescribes a punishment for breaches of the conventions (settled) among these :

Him who embezzles the property of a gaṇa or who violates their established usages, the king should banish from the country after confiscating all his property.[2]

Here ends (the section on) the violation of conventions.

Now begins (the section on) rescission of purchase.

Nārada (p. 149 v. 1) says :

When a purchaser, after having purchased an article for a (certain) price, does not approve of it (i. e. repents of the purchase), it is termed rescission of purchase, which is a title of law.

The same author (Nārada p. 150 vv. 5-6) fixes the time for examining an article (i. e. for buying an article on approval) :

One should examine milch cattle within three days (from purchase), beasts of burden for five days and the examination of pearls, diamonds and corals may extend up to seven days. (The examination) of male bipeds (i. e. male slaves) may extend to half a month and twice that (i. e. for a month) in the case of a female (slave), of all kinds of seeds for ten days and for one day in the case of iron and clothes.[3]

Kātyāyana says :

The rescission (lit. repentance) in the case of land extends to ten days for the purchaser or for the seller.

Bṛhaspati (p. 350 v. 6) says :

If some defect in any way is found (by examination) in the article before these (periods elapse), the article should be returned to the seller and the buyer should obtain the price thereof.

¶ Kātyāyana says :

If an article were purchased without being examined and was after-

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1. Vide p. 5 n 1 above for *śreṇi*, *pūga* and *kula*. Kātyāyana (vv. 678-680) defines the terms mentioned in this verse of Nārada. 'Pūga' is variously explained. Mayūkha gives one explanation. Kāt. explains it as 'companies of traders'. Vir. explains it as 'horse riders and elephant riders'. Kāt. explains 'vrāta' as meaning 'troops of soldiers armed with various weapons' and 'gaṇa' as an assembly of brāhmaṇas.' Vide notes to V. M. p. 386 for examples of conventions prevalent among heretics &c.

2. This punishment was to be awarded for serious offences, but for light ones Manu (VIII. 220) prescribed a fine of four suvarṇas or six niṣkas &c.

3. Compare Yāj. II. 177. These rules can apply only if the thing was purchased without examination.

* P. 216 (text). ¶ P. 217 (text).

wards shown to be defective, the article should be returned to its owner within the time (limited by the s'āstras) but not otherwise.

With regard to an article bought after an examination by (the purchaser) himself Nārada (pp. 149-150 vv. 2-3) says :

Where a purchaser, after purchasing an article for a price, thinks that he has made a bad purchase, it should be returned (by him) to the seller the same day without looking into it (i. e. without examining it).[1] If the purchaser were to return it on the second day, he would forfeit (lit. bring) a thirtieth part of the price ; if on the third day, double of that (i. e. a fifteenth part); after that it (the article) belongs to the purchaser alone (i. e. it cannot be returned).

Nārada (p. 150 v. 7) says :

A worn garment, which is dark and soiled, when purchased with (knowledge of) all faults cannot be returned to the seller.

Here ends (the section on) rescission of purchase.

Now begins (the section on) non-delivery of sold chattel.

Nārada (p. 146 v. 1) says :

When an article has been sold for a (certain) price and is not delivered to the purchaser, that is termed non-delivery of a sold chattel, which is a title of law.

* Yājñavalkya (II. 254) says :

He who having received the price of an article does not at all deliver it to the buyer should be made to deliver it to the buyer together with interest and if (the purchaser) has come from a foreign country, then together with the profit that he would have made in the foreign country.

' Dik ' means ' another country ' ; ' diglābha ' means ' the profit that would be made by sale in another country ' ; ' sodayam ' means ' together with interest '. The same author (Yājñavalkya II. 256) says :

' If an article suffer damage by an act of God or the king, the loss will fall on the seller alone if he did not deliver it on demand.

The same author (Yāj. II. 255) says :

If loss (of the thing sold) arises through the fault of the purchaser, the loss falls on the purchaser alone.[2]

Nārada (p. 148 v. 9) says :

When a purchaser, having purchased an article, does not accept it when

1. The reading ' avikṣatam ' (in an undamaged condition) is much better.
2. Compare section 107 of the Indian Contract Act.
* P. 218 (text).

it is delivered to him (by the vendor), the vendor incurs no balme (i. e. commits no wrong) by selling it to another.

Yājñavalkya says :

What was sold for an inadequate price by an intoxicated man or by one insane or by one who is dependent or idiotic must be given up (by the purchaser) and it would still belong to the vendor.[1]

All these rules must be understood as referring to an undertaking given by the seller to the effect ' the article is to be delivered to you alone and to none else, when the price is paid ', since* Nārada (p. 148 v. 10) says :

Thus has the rule (or law) been declared with regard to goods for which the price has been paid. When the price has not been tendered, there is no transgression by the vendor,[2] unless there be a special agreement (to deliver in spite of no price being paid).

On the sale of an article with blemishes Yājñavalkya says :[3]

That clever man who, knowing his chattel to be full of defects, sells it should be made to pay double its price (to the purchaser) and a fine equal to that (i. e. double the price).

Here ends the (section on) non-delivery of a sold chattel.

Now begins (the section on) dispute between master and herdsman.

When cattle or the like are destroyed (or injured) through the fault of the herdsman, Yājñavalkya (II. 165) says :

When the loss occurs through the fault of the herdsman, the fine ordained for him is twelve paṇas and a half and (he must give) to the owner also the animal[4] (or its price).

' Dravyam ' means ' a cow and the like '. Manu (VIII. 234) lays down the signs of ascertaining the death of cattle and the like.

1. This verse very closely resembles Bṛ. p. 350 v. 5. Some construe ' for an inadequate price ' as a separate cause for rescission.

2. No fault attaches to the vendor if he retains the article or disposes of it to another when no price is paid unless he specially agreed that he would not do so, though the price be not paid at once.

3. This appears to be the same as Bṛ. p. 350 v. 4. The verse in the text is not found in the printed Yāj. and is ascribed to Bṛ. by Sm. C. and Vīr. Compare Yāj. II. 257 and Nārada p. 148 v. 7.

4. ' Sārdhatrayodas'a ' is rendered as 13½ by the Mit., Aparārka and Smṛticandrikā, while the Vīr and Par. M. take it to mean 12½. The Vīr relies upon a Vārtika to Pāṇini II. 1. 34 and the usage of the Mahābhāsya. Vide notes to V. M. p. 392. Nīlakaṇṭha seems to hold that a similar animal should be restored to the owner.

* P. 219 (text)

When animals die, let (the herdsman) present to the master in order to show (him) the signs (for recognising his deceased cattle) the ears, their hides, their tails, the abdomen (or bladder), the tendons, the *pigment* (found in their heads &c.).

Madana says that ' aṅkaḥ ' means ' the horns and the like '. Yājñavalkya (II. 167) describes the portion of ground (to be set apart) as pasturage for cows and the like :

* A vacant space (for grazing cattle) of one hundred bows should be left between one village and another ; two hundred bows in the case of a large-sized village and four hundred bows in the case of a town.[1]

' Parīṇāhaḥ ' means ' land set apart for pasture for kine and the like. This *parīṇāha* is the same as *parīhāra*, since Manu (VIII. 237) says : round about a village an enclosure should be kept of one hundred bows ; ' a *kharvaṭa* is a village having several artificers and husbandmen ; some say it means ' a village abounding in thorny shrubs '.[2] Yājñavalkya (II. 159-161) describes the fine to be paid by the owner of beasts when they eat the growing crop or the like belonging to another :

(The owner of) a she-buffalo doing damage to crops should be fined eight māṣas, half of that (the owner of) a cow (should be fined); half of that (i. e. two māṣas) (the owner of) goats and sheep. For cattle sitting down in the field after eating the crops the fine is double of that already stated. The same fine is to be levied in the case of enclosures (in which grass is stored); asses and camels are equal to she-buffalo (as regards fine). As much crop as may be destroyed (by straying animals) shall be made good to the owner of the field ; the herdsman (if at fault) shall be whipped but the owner of the cattle incurs the fine already stated.

‡' Vivītam ' means ' a place for storing grass, wood and the like '. Us'anas states an exception to the above :

(Owners of) cows are not to be fined during festivals (if they stray) and at the time for s'rāddha.

Vyāsa says :

O best of men, what was enjoyed by brāhmaṇas after committing a trespass, by very indigent relations or by cows excels the Vājapeya[3] (in merit).

Us'anas says :

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1. The reading of the printed text is ' grāmakṣetrāntaram ' (which means ' between a village and the 'fields'). A bow was often taken as equal to four cubits. Vide p. 66 for various lengths of a bow.

2. This is the explanation given by the Mit. The Mayūkha follows the Madanaratna.

3. Vājapeya is one of the seven *soma* sacrifices. Vide Gautama VIII, 21.

* P, 220 (text). ‡ P. 221 (text).

Neither the *pitṛs* nor the gods taste (the offerings) of that man who demands back the corn destroyed by cows.[1]

Thus ends the (section on) dispute between master and herdsman.

Now begins (the section on) boundary disputes.

Bṛhaspati (p. 351 vv. 5-6) states the means whereby boundaries may be ascertained :

Dry cowdung, bones, chaff, charcoal, gravel, pieces of stones hollowed out, sand, bricks, cow's tails, cotton seeds, ashes—after having put these things in jars one should deposit them underground at the ends of boundaries.[2]

Yājñavalkya (II. 152) states some special rules about witnesses in this matter :

Or men from neighbouring villages, even in number, either four, eight or ten, wearing red garments and garlands of red flowers and carrying on their heads clods of earth, should trace (or point out) the boundary.[3]

Nārada (p. 157 v. 9) says :

One man[4] single-handed should not settle the boundary, even though he be confident (about his knowledge of the boundary). This decision (about a boundary) must be entrusted to many, since it is an affair of importance.

* Bṛhaspati (p. 352 v. 11) says :

In the absence of witnesses and signs (of boundaries) even a single upright man acceptable to both (disputants), wearing a garland of red flowers and a red garment and carrying a clod of earth on his head, adhering to truth and having kept a fast, may fix the boundary.

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1. The Vīr.(p.451)is careful to add that this applies to cows only at the time of s'rāddha.

2. The marks of boundaries are either patent (prakās'a) or concealed (upāṁs'u). Vide Manu VIII. 249. Wells, tanks, large trees, gardens, temples, mounds, beds of rivers—these are (Bṛ. p. 351 v. 3) visible signs and the verses in the text give the invisible ones. Compare Manu VIII. 250-251 for a similar enumeration.

3. The boundary was to be settled by the evidence of witnesses properly so called (a witness would be one who actually saw the boundary laid out). Vide Manu VIII. 253. This verse says that in the absence of witnesses, *sāmantas* should settle it. 'Sāmantāḥ samagrāmāḥ' is explained by Mit. as 'neighbouring villagers even in number'. The words 'four, eight, ten' indicate according to Aparārka that two or six will not do; the Mit. does not support this view. Vide Manu VIII. 258 about *sāmantas* being four and VIII. 256 about red garments and garlands.

4. Dr. Jolly translates 'pratyayavān-api' as 'even though he be a reliable person.' This is not correct. The Mit. says that this verse applies where the single man is not accepted by both parties as an arbiter.

* P. 222 (text).

Kātyāyana says:

In the case of settling the boundary by walking, in the ordeal by *kos'a* (sacred water of the bath of idols &c), in swearing by the feet of (idols, elders or brāhmaṇas), (the visitation of) divine or royal displeasure is to be expected within three fortnights, one fortnight and a week respectively.[1]

Manu (VIII. 257) says:

The truthful witnesses who point out the true boundary in aforesaid manner are absolved from sin; but such as settle it falsely should each be fined two hundred (paṇas).

Nārada (p. 156 v. 7) says:

If the neighbours speak what is not true in settling a boundary, they should all be separately fined by the king the middle amercement.

Kātyāyana says:

Of the several persons gathered together (for settling a boundary) if all of them do not (properly help to) decide either through fear or covetousness, they should (each) be made to pay the highest amercement.

Yājñavalkya (II. 153) says:

In the absence of persons knowing the boundary or marks (indicating it), the king is to settle the boundary (as he thought fit).[2]

* Manu (VIII. 265) says:

When the boundary cannot be ascertained, the king, knowing the law, should himself assign the (disputed strip of) land to that one party to whom it would be most serviceable. This is the settled rule.[3]

The same author says:

One should not disturb a man in the manner and extent of the enjoyment of a house, (of access through) a door or of a market and the like which he had from the time of its foundation.[4]

Kātyāyana also says:

One should not interfere with (another's) base of the wall, drain, balcony, window, watercourse and dwelling house; he who obstructs would be liable to fine.

'Mekhalā' means 'the built base of a wall (i. e. the plinth)'; 'bhramaḥ' means 'passage for the exit of water'; 'Niṣkāsaḥ', according

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1. The idea is that the boundary was not to be regarded as final for three fortnights; if within that time the person or persons settling it were visited with divine or royal displeasure, then it was to be held that they decided falsely.

2. Under the Bombay Land Revenue Code (Bombay Act V of 1879) section 121, the Collector's decision as to the boundary between two survey numbers is final.

3. 'Avisahyāyām' is variously explained, Aparārka, Sm. C. and Vir. explain as 'devoid of witnesses and marks', Kullūka and Vir. as 'impossible to ascertain'.

4. This is not found in Manu but in Bṛhaspati p. 354 v. 24, where 'vāri' (water) is read for 'dvāra'.

* P. 223 (text).

to Madana, means a place for sitting down constructed of wood projecting from a mansion and the like, but not touching (resting on) the ground. In some books the reading is ' dhūma-niṣkāsaḥ ', the meaning of which is ' a window or the like for letting out smoke '. By the word ' ādi ' (in the verse preceding Kātyāyana's) are intended the walls of others and the like. The same author (Kātyāyana says) :

After the time of the first entry (or foundation) such things are not to be added at any time ; one should not open a window so as to have a peep into the dwelling houses of others or construct a drain for rainwater on to the house of another.[1]

Bṛhaspati (p. 354 v. 26) says :

A privy, a fire-place, a pit, a receptacle for throwing in leavings of food and dirty water—these should never be constructed very close to the wall of another.

*' Varcaḥ-sthānam ' means ' a privy ' ; ' atyāsāt ' means ' very near '.

Kātyāyana says :

Places for depositing ordure, urine or (soiled) water, the construction of a fireplace or pit should be made leaving (at least a space of) two hands from the wall of another.

Bṛhaspati (p. 354 v. 27) says :

A path by which men and beasts go to and fro unhindered is declared to be ' saṁsaraṇa ' and must not be obstructed by anyone.

Nārada (p. 158 v. 15) says :

One should not obstruct a cross-road, the sanctuary of a deity, a king's highway by (heaping) ordure, by a raised platform, a pit, aqueduct or the eaves of houses.

Kātyāyana says :

That is called a cross-road (or thoroughfare) by which all men pass at any time without being prevented and that is called a rājamārga (a king's highway) by which all men pass at stated times.

Bṛhaspati (p. 354 v. 28) says :

He who makes obstruction on a thoroughfare (by keeping carts &c.), or makes a pit, or plants trees or voids ordure wilfully shall pay one māṣaka as fine.

Manu (IX. 282) says :

He who voids ordure on the king's highway when there is no calamity (or urgent pressure) should pay (as fine) two kārṣāpaṇas and should immediately remove the filth.[2]

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1. ' To have a peep into ' &c.—This speaks of the right of privacy which is recognised by custom even now in Gujerat. Vide *Nathubhai* v. *Chhaganlal* 2 Bom. L. R. 451, *Maneklal* v. *Mohanlal* 44 Bom. 406 (=22 Bom. L. R. 226). These are not to be added so as to interfere with another's rights.

2. Great leniency was shown to old men, pregnant women and minors. Vide Manu IX. 283.

* P. 224 (text).

*Kātyāyana says:

He who defiles with filth a tank, a garden or holy water should be fined the first amercement after making him remove the filth.

Yājñavalkya (II. 155) says:

For destroying boundary, for encroaching beyond the boundary, and for usurping a field the fines (respectively) are the lowest, the highest, the middling.

Manu (VIII. 264) says:

One who usurps by intimidation a house, a tank, a garden or a field should be fined 500 (paṇas) but the fine is two hundred if he did it through ignorance.

Kātyāyana says:

The fruits and flowers of trees growing on the boundary between two fields should be declared as joint between the owners of the fields.

Kātyāyana says:

But where the branches of trees growing in one man's field are spread over another's field, he should be considered as the owner in whose field the (branches) stand spread out.[1]

Yājñavalkya (II. 157) says:

When a man without informing the owner of a field, makes a water-course in that field, the owner (of the field in which the *setu* is made) is entitled to the profit arising therefrom or in his absence the king.[2]

¶The same author (Yāj. II. 156) says:

A dike that produces benefit should not be forbidden because it causes some slight injury; as also a well which occupies little space but has abundant water (should not be prohibited) because it deprives another of some land.

'Na niṣedhyaḥ' (should not be prohibited) has to be understood (after 'kūpaḥ').

Nārada (p. 158 v. 17) also says:

(The erection of a) dike in the middle of another man's field is not forbidden, if it confers great benefit while the loss is trifling; large increase (of crops) is desirable even if there be (slight) loss (of land).

Nārada (p. 159 v. 20) says:

If a man were to repair (start afresh) a dike erected in former times,

1. Kātyāyana draws a distinction between 'jātāḥ' and 'saṁsthitāḥ.' Therefore it is proper to understand after 'saṁsthitāḥ' in the fourth quarter the word 's'ākhāḥ.' Mandlik (p. 136) translates 'in whose field the trees stand.' But this is not correct. The reference is to the fruits and flowers growing on such branches.

2. 'Setu' does not mean bridge here, but a dike or watercourse. A setu is of two kinds, one *kheya* (which is dug into the ground) and the other is *bandhya* (which prevents the access of water). Vide Nārada p. 158 v. 18. The purport of the verse is that a setu should not be made in another's land without his permission or without giving him some consideration.

* P. 225 (text). ¶ P. 226 (text).

but which had become dilapidated, without the permission of the owner, he shall not have the (use and) profit thereof.

Vyāsa says ;

He who having taken a field does not himself cultivate it nor causes it to be cultivated by another should be made to pay to the owner of the land its produce and a fine equal in value to the king.[1]

'S'adam' means 'as much crop as it was possible to raise from the field.'

Here (ends the section) on boundary disputes.

Now (begins the section on) Abuse.

*Bṛhaspati (p. 355 vv. 2–4.) says :

That is said to be abuse of the lowest degree when the country, village, the family or the like of a man is abused or sinfulness is ascribed (to a man) without specifying any definite act (or object).[2] Speaking of one's (the absuser's) connection with the sister or mother (of the abused), or ascription of minor sins (to the abused), is termed abuse of the middling sort by those who are learned in the S'āstras.[3] Charging a man with taking forbidden food or drink, or taxing him with (the commission of) mortal sins, mercilessly exposing a man's weakest point–this is termed abuse of the highest degree.[4]

'Dravyaṁ vinā' (in the first verse) means 'without specifying any definite object,' that is, it is merely a verbal abuse; 'abhighaṭṭanam' means 'exposing' (or divulging). Viṣṇu (Dh. S. V. 35) says 'For abuse of one of the same class (as the abuser) a man should be fined twelve paṇas.' In another smṛti it is said :

When two parties have been guilty of abuse (insult) and both have begun (to quarrel or abuse) at the same time, both shall undergo the same punishment, if no differentiation is apparent (in respect of their culpability).[5]

Nārada (p. 208 v. 9) says :

He who is the first to offer an insult is decidedly to blame ; he who returns the insult is also a wrong-doer ; but the one who is the first (i. e. who began) shall undergo tho heavier punishment.[6]

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1. Compare Yāj. II. 158.
2. Compare Nārada p. 207 v. 1.
3. Vide Manu XI. 59-66 and Viṣṇu chap. 37 for upapātakas.
4. For mahāpātakas vide Manu XI. 54.
5. This is Nārada p. 208 v. 8.
6. 'Ākṣārayet' means 'one who falsely charges with the commission of a sin,'

* P. 227 (text).

Manu (VIII. 267) says:

One defaming (or abusing) a brāhmaṇa shall incur the fine of a hundred paṇas, if he be a kṣatriya ; if a vaiśya a hundred and fifty or two hundred, but if a śūdra, he shall be liable to corporal punishment.[1]

*Bṛhaspati (p. 356 v. 7) says :

For a brāhmaṇa abusing a kṣatriya the fine is fifty; for abusing a vaiśya half of fifty (i.e. twenty-five); for abusing a śūdra twelve and a half.[2]

The same author (Bṛhaspati p. 356 v. 12) says with reference to a śūdra :

(A śūdra) giving instruction as to the peculiar duties (of the classes &c.), loudly uttering the Veda, or reviling brāhmaṇas is punished by cutting out his tongue.[3]

Manu (VIII. 275) says:

A man accusing his mother, father, wife, (elder) brother, father-in-law and preceptor (of sin) shall be made to pay a fine of one hundred paṇas, as also he who does not make way for his preceptor.

' Bhrātā ' means ' the elder one ', since the word is in association with the father and other (venerable persons). In the Mitākṣarā and other works it is said that (this punishment is incurred) in the case of the mother and the rest (even though) they be guilty (of the sin charged) and in the case of the wife (only) if she be innocent. Yājñavalkya (II. 208-209) says :

For a verbal threat of injuring the arms, the neck, the eyes or thigh, the fine shall be a hundred ; and a half of it in the case of the foot, nose, ear, hand or the like. When however a feeble man speaks thus he should be fined ten paṇas; so one who is unable (to carry out his words into execution) should be made to furnish a surety for the safety of the other.

†The same author (Yāj. II 205, 211) says :

The king shall compel a man to pay a fine of twenty-five paṇas who abuses another, by saying ' I shall have carnal intercourse with your sister or mother '. For abuse of brāhmaṇas learned in the three Vedas, of the king and of gods the fine is the highest amercement.

Nārada (p. 210 v. 21) says :

One who calls an outcast an outcast or a thief a thief is equally criminal (with those whom he charges) on account of the texts to that

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1. 'Vadha' is frequently used in the sense of corporal punishment. Vide Manu VIII 129 where we have *dhanadaṇḍa* and *vadhadaṇḍa*. Mandlik translates 'vadha' by death here. But this is too drastic a sentence, since Manu VIII. 270 prescribes only cutting the tongue. Vide also Bṛhaspati a little below.

2. Compare Gautama XII. 8-10. As each succeeding fine is half of each preceding it is better to take 'ardhatrayodaśa' as $12\frac{1}{2}$ and not $13\frac{1}{2}$ (in spite of the Mit. on Yāj. II. 204). Vide text P. 219 'ardhatrayodaśapaṇaḥ' and note thereon above.

3. Compare Gautama XII. 4, Āp. Dh. S. II. 10. 27. 14.

* P. 228 (text). † P. 229 (text).

effect; but (if he reproaches them) falsely he is twice as guilty (as they would be).[1]

Yājñavalkya (II. 204) says:

He who by true, untrue or ironical statements ridicules persons wanting in a limb or organ of sense or diseased persons, should be fined twelve paṇas and a half.

Us'anas says :

For him who pleads 'such a thing was said by me from ignorance, carelessness, envy or friendship; I shall not say so again' (the king) should prescribe half (the ordinary) fine.

Here ends (the section on) abuse.

Now begnis (the section on) assault.

Nārada (p. 207 v. 4) says;

Hurting the limbs of another with the hand, foot, weapon or otherwise or defiling a man with ashes (or other impure substances) is termed assault.

*Bṛhaspati (p. 357 v. 4) says:

He who having been abused returns the abuse or having been beaten returns the blow or strikes an offender down commits no wrong.[2]

Kātyāyana *says:*

Bhṛgu has ordained that the highest fine shall be inflicted for cutting off the ear, nose, foot, eye, the tongue, the penis or hand; and the middling one for injuring (or wounding) any one of them.

Yājñavalkya (II. 213-214) says:

For throwing ashes, mud or dust the fine is declared to be ten paṇas; and double that amount for assaulting a man with an impure thing or with the heels or with spittle. This is so as regards offenders of the same class with (those whom they offend); (for offences) against the wives of others (of whatever caste) or against one of a higher caste (than the offender) the fine is double (of the above). The fine is half

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1. 'Vacanāt' may also mean 'even if he only says what is true.' The mere truth of an imputation was no defence in a charge for defamation. Vide exception one to sec. 499 of the Indian Penal Code, which requires that the imputation be made for the public good. Compare Manu VIII. 274. Kātyāyana (verse 176) lays down that if a man were called 'patita' in order that others should avoid contact with him, there was no punishment.

2. Bṛ. (p. 353 verse 13) has another verse, which is similar to Nārada's quoted under 'abuse.' This verse does not conflict with them. It states the right of private defence and also means to convey that the man who returns an abuse or a blow is not equally guilty with him who starts the affair.

* P. 230 (text).

(of above) if the offence be against persons of lower class (than the offender). (For acts committed) through ignorance, intoxication or the like there shall be no fine.[1]

'Pārṣṇiḥ' means 'the hind part of the foot'. Kātyāyana says:

The fine shall be raised to fourfold when (assault is committed) with vomited matter, urine, or ordure and the like: sixfold if (these are thrown) on the middle of the body and eightfold if thrown on the head.

Yājñavalkya (II. 216) says:

When the hand and foot are (only) raised up (to strike), the fine is respectively ten and twenty paṇas. For threatening each other with a weapon, the middle amercement is prescribed for all castes.

*The same author (Yāj. II. 217-218) says:

For violently pulling the foot, hair, garment or hand the fine is ten paṇas; the fine is one hundred for violently pulling a man after covering him with a garment and tightly tying him with it and then trampling him under the feet. A man who causes pain with a stick or the like and also causes blood (to come out) should be fined thirty-two paṇas, double that sum when blood is seen (to come out).[2]

The meaning of 'pīḍā etc.' is 'for covering with a garment, tightly tying (or dragging) and trampling under feet (the fine) is one hundred.'

The same author (Yāj. II. 219, 215) says:

The middling fine (is prescribed) for breaking a hand, foot or tooth, for tearing (or piercing) the ear or nose, for opening up a sore (that was healed up), for so severely beating a man as to leave him almost dead. The limb with which any one not a brāhmaṇa causes pain or injury to a brāhmaṇa should be cut off. When (a weapon or stick) is raised for striking (a brāhmaṇa) the first amercement (should be awarded) and half of it if the weapon was only touched (and not raised).

Manu (VIII. 279-280) says:

With whatever limb a man of the lowest caste (i.e. s'ūdra) strikes one of a higher class, that very limb of his should be cut off; this is the ordinance of Manu. If (a s'ūdra) raises his hand or a stick (for striking one of a higher class) he is liable to have his hand cut off.

Kātyāyana says:

Just as different fines have been prescribed for abuse according to the direct or reverse order (of classes), so also for assault (different) fines should be inflicted according to the order (of the classes).

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1. The Mit. takes 'uttameṣu' to mean 'more learned and better in character than the offender.'

2. The reading 's'oṇitena samam,' though of almost all mss., is bad, as it conflicts with the fourth quarter of the verse. Mit. and Aparārka read 's'oṇitena vinā' (without shedding blood) which makes good sense.

* P. 231 (text)

*Viṣṇu (V. 73) says 'when several simultaneously strike down one man, the fine for every one of them shall be double of that declared' (where a single man strikes another).[1] Kātyāyana says:

For injury to the organs of the body just as a fine is to be imposed (by the king), so also something must be given for appeasing the man (injured) and also for curing him (as may be fixed) by experts.[2]

'Tuṣṭikaram' means 'what would satisfy the man beaten'; 'samutthānam' means 'the price of drugs etc.'; 'abhijñaiḥ' means 'by experts', the meaning being 'what may be fixed by experts should be paid.' Yājñavalkya (II. 225-226) says as to striking beasts:

For beating, shedding blood and for cutting off the horns and the limbs of minor beasts (like goats, sheep and deer) the fine shall be from two paṇas (upwards);[3] for cutting off their organs of generation and for causing (their) death the middle amercement (shall be inflited) and the price (of the beast be paid to the owner). The fine is double for these (offences of beating, shedding blood and etc.) in the case of large animals (like bullocks, horses and etc.).

In respect of damage to trees Manu (VIII. 285) says:

The settled rule is that a fine must be inflicted (for injuring trees) according to the usefulness of the several kinds of trees.[4]

Thus ends (the section on) assault.

Now begins (the section on) theft.

Nārada (pp. 204-5 vv. 14-16) speaks of three kinds of chattels as being useful (in the treatment) of theft:

Earthenware, a seat, a couch, bone, wood, leather, grass and the like, leguminous corn (like māṣa, mudga), cooked food—these are termed articles of small value. Clothes made of materials other than silk, beasts other than cows, metals other than gold, rice and barley (these are declared to be of) middling value; ‡gold, precious stones, silk, women and men (slaves),

1. Compare Yāj. II. 221 for almost the same words.

2. Compare Yāj. II. 222 and Bṛ. (p. 358 v. 10.)

3. This means according to Aparārka two paṇas for beating, four for drawing blood, eight for cutting off horns, 16 for cutting off a limb; while the Mit. says that it is respectively 2, 4, 6, 8.

4. Compare Viṣṇu Dh. S. V. 55-59. Those who destroyed trees had to pay the price also to the owner. Vide Yāj. II. 228 for higher fine for cutting trees growing near temples and boundaries.

* P. 232 (text). ‡ P. 233 (text).

cows, elephants and horses, and what belongs to a god, a brāhmaṇa or a king—these are regarded as articles of high value.[1]

Here the same author describes open thieves :

Traders, quacks, gamblers, (corruptible) assessors (and judges), those who accept bribes, cheats, those who (profess to) foretell and interpret portents and fortune, *nautch* girls (or prostitutes), those who sell imitations (such as imitation pearls and jewels), (hired servants) refusing to do their work, those who profess to arbitrate (and make money by favouring one side), false witnesses, so also jugglers—these are open thieves.[2]

Similarly in another smṛti (Nārada p. 223 vv. 2-3) it is said :

Open thieves are those who employ false measures and balances (i. e. weights), receivers of bribes, those who are full of tricks, impostors, women of ill repute (prostitutes), those who manufacture imitations, those who make their livelihood by declaring how a person may bring about his welfare (i. e. who sell *amulets* etc.),—these and such like persons are considered open thieves in this world.[3]

Bṛhaspati (pp. 360—vv. 7-15) says :

A merchant who sells articles after concealing their blemishes, or after mixing (good and bad ones together) or sells (old articles as new) after repairing them should be made to pay double (the price of) the goods (to the purchaser) and an equal fine (to the king).[4]

*That physician, who, though unacquainted with drugs and spells and also ignorant of the true nature of a disease, yet takes money from the sick shall be punished like a thief. Gamblers-playing with false dice, *nautch* girls, those who appropriate to themselves the king's taxes, astrologers and cheats-these rogues are declared to be liable to fine. Assessors pronouncing an unjust decision, also those who live by taking bribes, those who deceive people that put trust in them-all these should be banished (from the country). Those who, without knowing the lore of stars or portents, yet expound omens to people should be sedulously punished. Those who, endowing themselves with staff and deer[5] skin, show themselves off to people (as ascetics) and harm mankind in this disguise, should be corporally punished by the

1. Yāj. II. 275 alludes to these three classes of movables, the subjects of theft.

2. These verses are Bṛ. p. 360, vv 3-4. Manu (IX 256-257) divides thieves into two classes, prakāś'a (open) and aprakāś'a (concealed) or pracchanna. 'Akriyākāriṇaḥ' may also mean 'those who set up evidence that is no evidence.'

3. Dr. Jolly translates 'pratirūpakāḥ' as 'those who walk in disguise', but that is doubtful. He translates 'maṅgalādes'a-vṛttayaḥ' as those who live by teaching the performance of auspicious ceremonies.' Compare Manu IX. 258-260 for open thieves.

4. 'An equal fine' may mean 'equal to the price' or it may mean 'equal to the double that is to be paid to the purchaser.

5. Vide Baudhāyana Dh. S. II. 10. 12 and Manu VI. 52 for staff and deer-skin being two of the peculiar marks of a sannyāsin.

* P. 284 (text).

king's officers. Those who, by repairing and polishing articles of small value, make them appear as of great value and deceive the ignorant should be fined in proportion to the gain (made by them). Those who make false gold, false jewels, false coral and the like should be made to return to the purchaser the price and to the king a fine double (of the price of the article they professed to sell). If arbitrators cheat (either party) through friendship or covetousness or the like motive and if witnesses give false evidence, they should be made to pay a fine double (of the claim).

*Vyāsa says:

Those, who stealthily move about at night, furnished with tools (for robbery) and whose places of residence are not known, should be known as secret thieves.

The same author (Vyāsa) says:

A pick-pocket, a house-breaker, a highway robber, a cut-purse, he who steals women, men, cows, horses and other animals—these are declared to be nine kinds of thieves.[1]

'Sandhi' means 'the joint of a wall and the like.' Yājñavalkya (II. 274) says:

The pickpocket and the cutpurse should be deprived of their two fingers (viz. the thumb and the index finger); for the second offence they should be deprived of the hand and the foot.[2]

'Sandaṁs'aḥ' means 'the thumb and the forefinger.' Manu (IX. 276) says:

The king should cut off the hands of those robbers who having made a hole in a wall commit a theft at night and should impale them on a sharp stake.

Bṛhaspati (p. 362 v. 17) says:

So highway robbers should be bound and should be hanged by the neck from a tree. The king should cut off the fingers of a cut-purse when he is caught for the first time, his hands and feet (when caught) a second time and he deserves death (when caught) a third time.[3]

Aṅgulī' means 'the forefinger and the thumb.'

Nārada (p. 225 vv. 16-17) states a special rule when the thief runs away taking the booty with him:

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1. 'He who steals...animals'-this contains five kinds of thieves.

2. 'Samdaṁs'a' means 'tongs.' The Mit. explains that the picketpocket's hand should be cut off and the tong-like two fingers of the cutpurse should be cut off. For repeating the offence, one hand and one foot was to be cut off, according to V. R. As they found the two fingers most useful in theft they were to be deprived of them.

3. This last verse is Manu IX. 277. On account of Yāj. II. 274 the fingers meant here are the forefinger and the thumb though the plural 'aṅgulīḥ' is used in Manu. The Mâyūkha seems to have read 'aṅgulī granthibhedasya.'

* P. 285 (text)

*In whosesoever land (range or jurisdiction) a theft takes place should try to catch the thief or he should be made to pay (the price of) the thing stolen, if the footmarks have not gone out from that land or range). When the footmarks (of the thief) are not seen anywhere else after leaving the place (where the theft was committed), the king should make neighbours, the guardians of the roads (marches) and the governors of the district pay (for the stolen goods).

Yājñavalkya (II. 272) also says:

The village shall pay (the price of stolen goods) when the theft took place within its own borders (provided footmarks are not found to go out of the village) or (that village should pay) to which the footmarks (of the thief) are traced; if (theft committed) beyond one *kros'a* from the village, then the five (surrounding villages) or ten villages should pay.[1]

On the point of kidnapping women Vyāsa says:

The kidnapper of a woman shall be burnt on an iron bedstead with a fire of grass (or weeds). The kidnapper of a man should have his hand and foot cut off and be exposed in a thoroughfare.[2]

Bṛhaspati (p. 362 v. 19) says:

A cow-stealer shall have his nose cut off and shall be plunged into water after being bound.

Narada (p. 227 v. 28) says:[3]

If a man kidnapped a married woman his whole wealth (was to be confiscated by the king); but if he kidnapped a maiden he should be killed. For a theft of horses, elephants and metals, the king should take (the whole wealth); this is the view of Bṛhaspati.

The word 'sarvasvam' is to be repeated (in the second half-verse).

Vyāsa says:

Of a thief of cattle half the foot should be cut off with a sharp weapon.

‡ Nārada (p. 227 v 29) says:

On him who steals a large animal (elephant, horse &c.) the highest fine shall be inflicted; the middling on him who steals an animal of middle size and the first for theft of minor animals.

Manu (VIII. 320) says:

On him who steals more than ten *kumbhas* of corn corporal punishment shall be inflicted. In other cases (i. e. theft of one to ten *kumbhas* of corn) he should be fined eleven times as much (as the price of stolen

1. V. R. explains 'village' as 'headman of the village,' while Mit. explains it as villagers.

2. Compare Br. p. 362 v. 18.

3. Nārada has only the first half. Compare Manu VIII. 323. The conflict about punishments between various smṛtis is due to considerations of the castes of the thieves, their being poor or well-off and the worth of the object stolen. So says V. R.

*P. 236 (text). ‡ P. 237 (text).

corn) and shall pay (to the owner) the price (of stolen corn).[1]

'A kumbha' is equal to twenty *prasthas*. The same author (Manu VIII. 323) says :

For stealing the principal among precious stones (the thief) deserves corporal punishment.[2]

Nārada (p. 227 v. 27 = Manu VIII. 321) says :

For stealing more than one hundred *palas* of gold, silver and the like or for stealing the finest clothes or all precious gems corporal punishment (shall be inflicted).

Manu (VIII. 321-322) says :

The cutting of the hand is approved (as the punishment) for the theft of more than fifty palas of gold, silver and the like or of the finest clothes; for stealing less (than fifty palas) the king should impose a fine eleven times as much as the price (of the stolen thing).

Yāj. (II. 270) says :

A brāhmaṇa (guilty of theft) should be branded and banished from the kingdom.[3]

*Manu (IX. 240) says :

The first (three) classes, if they undergo (the proper) penance (for theft), were not to be branded on the forehead by the king but were to be made to pay the highest amercement.[4]

Yājñavalkya (II. 270) also says :

The king should make the thief restore the thing stolen (or its price) and should inflict on him various kinds of corporal punishment.

Nārada (p. 205 v. 19) says :

Those also who give food and shelter to thieves who run about (to avoid punishment) and those who being able (to arrest them) allow them to escape incur the guilt of thieves.[5]

And they are also liable to the same penalty.

Here ends (the section on) theft and robbery.

1. Kumbha was a very large measure of corn about the exact extent of which there was great divergence of opinion. Vide votes to V. M. p. 412. The Mit. says that a kumbha was equal to 20 *droṇas*, while Aparārka says it is equal to two *droṇas*. The V. R. says it is equal to twenty *prasthas*. Mayūkha follows this. According to some, twelve prasṛtis made a kuḍava, 4 kuḍavas made a prastha.

2. Kullūka explains that 'vadha' may consist in flogging, mutilation or even capital punishment according to the status of the person robbed and the robber.

3. The mark to be branded was a dog's foot. Vide Manu IX. 237. Vide next verse also.

4. For prāyas'cittas for theft vide Manu XI. 162--168 and Yāj. III. 257--258. The text of Manu has 'sarvavarṇāḥ' (all classes).

5. Compare Manu IX. 278 and Yāj. II. 276.

* P. 238 (text).

Now begins (the section on) heinous offences.

Nārada (p.202 v. 1) says about the nature of sāhasa :

Whatever act is performed by force by those who are puffed up with (the pride of) strength is called sāhasa (a heinous offence); *sahas* here means strength.[1]

Bṛhaspati (p. 359 v. 1) says :

Homicide, theft, assault on another man's wife and the two kinds of *pāruṣya* (viz. abuse and assault)—these are the four kinds of *sāhasa.*

*' Ubhayam ' means ' both abuse and assault.' Nārada (p. 203 vv. 4-6) says :

Destroying fruits, roots, water and the like and implements of husbandry, throwing away or reviling them and trampling upon them—this is declared to be sāhasa of the first degree; destroying &c. clothes, cattle, food or drink, or household utensils is declared to be middling sāhasa; taking human life by poison, weapons or other means, assault on the wife of another, and whatever else endangers human life is called *sāhasa* of the highest degree.

Yājñavalkya (II. 273) says :

The king shall cause to be impaled on stakes those who make others captive, those who (forcibly) carry away horses and elephants, and who kill others by force.

Bṛhaspati (p. 363 v. 30) says :

Those who are openly murderers and those who are secret assassins shall be put to death by the king by various modes of execution after finding them out and after confiscating their property.

The same author (Bṛhaspati p. 363 v. 31) says :

Where several persons in anger beat a single individual (and kill him) that man is declared to be the murderer (and suffers the punishment for murder) who strikes (the victim) on a vital part (i. e. who gives the fatal blow).

¶Kātyāyana says :

One who commences a sāhasa, or aids it, or who gives instructions as to the way (in which it may be committed), who gives asylum or furnishes weapons or food to evil-doers, who advises fighting, who incites to the destruction of the person (killed), who connives (at the commission of an offence), who speaks ill (of the person killed &c.), who approves (of the offender's act), who, though able (to prevent an offence), does not forbid it—all these are (practically) perpetrators of the deed. (The king) should prescribe for them suitable punishments according to the capacity

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1. Steya must be distinguished from *sāhasa.* In the former there is no use of force or threat of using it; in sāhasa there is use of force or threat of the use of it.

* P. 239 (text). ¶ P. 240 (text).

of each offender.[1]

Nārada (pp. 203–204 vv. 9–10) states a special rule as to the punishment of brāhmaṇas :

This is the law of punishment ordained for all (classes) without distinction, save only corporal punishment in the case of a brāhmaṇa (offender). A brāhmaṇa (offender) is not liable to corporal punishment (such as mutilation, death). The punishment for him (brāhmaṇa offender) is shaving of the head, banishment from the city, branding him on the forehead with the mark appropriate to the crime and marching him (through the streets) on an ass.[2]

A brāhmaṇa, even though an *ātatāyin* (a felon or desperate character) was not to be killed, since Sumantu says 'there is no sin in putting to death an *ātatāyin*, except cows and a brāhmaṇa.'[3] Kātyāyana says :

According to Bhṛgu there shall be no (punishment of) death in the case of a felon, who belongs to the highest class and who is endowed with austerities and study of the Vedas and that (the punishment of) death (is prescribed) for a sinner of a lower class (than a brāhmaṇa).

*The same author says :

He who makes ready a sword, poison or fire (for perpetrating a crime), also one who raises his hand for an imprecation, who kills by the (recitation of) incantations contained in the Atharvaveda, who is an informer of the king (whereby another man may lose his life), who assaults (or violates) another's wife, who is intent on picking out the weakest points (of others)—all these and the like should be known as *ātatāyins*.[4]

Vasiṣṭha (III. 16) also says :

An incendiary, a poisoner, one armed with a weapon, one who robs another of his wealth, one who snatches away another's field and wife- these six are ātatāyins.

As to what Manu (VIII. 350) says :

One may certainly kill without hesitation a man who comes upon him as an ātatāyin, whether he be a teacher or a child or an old man or a learned brāhmana '

and as for the text of Kātyāyana (same as Vasiṣṭha III. 17)

'one may go on to kill another who approaches as an *ātatāyin* (i. e.

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1. 'Who connives'—This man is not able to prevent the offence, but he does not raise even a vain protest nor does he inform others of the intended *sāhasa*.

2. As to absence of corporal punishment for a brāhmaṇa, compare Gautama XII. 43, Manu VIII. 379--380, Baud. Dh. S. I. 10.17. As to the marks branded for the several sins, vide Manu IX. 237 and Baud. Dh. S. I. 10.18. For the several punishments appropriate to a brāhmana offender *vide* Baud. Dh. S. I. 10.18, Gautama XII. 44 and Manu VIII. 379-380.

3. The text of Sumantu is variously read and interpreted. Vide Vir. p. 22.

4. 'Ātatāyin' literally means 'one who goes with his bow strung' (i. e. ready to fight). Rudra is called ātatāyin in Vāj. S. 16.18 and Kāṭhaka S. 17. 12. Atharvaveda I. 19, II. 19, III. 1 and 2, VII. 108 were employed as charms against enemies,

* P. 241 (text).

with a felonious intent), even if he be one who has thoroughly mastered the Vedas; thereby he does not incur the sin of *brāhmaṇa* murder these (two texts) are (really) meant to apply to an ātatāyin who is not a brāhmaṇa as the use of the word 'api' (even) and 'vā' shows.[1] The reference to the brāhmaṇa is in the nature of an *a fortiori* argument[2] as in 'even a brāhmaṇa, if an ātatāyin may be killed, what then of another.' This is the explanation given in the Mitākṣarā,[3] since Gālava says:

*He who kills even a learned brāhmaṇa[4] who approaches as an ātatāyin raising his weapon (to strike) does not become the murderer of a learned brāhmaṇa; he would be so if he did not kill him.

and since Bṛhaspati says:

He who kills a brāhmaṇa felon versed in the Vedas and born of a good family does not commit a brāhmaṇa murder; he would be guilty of of brāhmaṇa murder if he did not kill him.'

The conclusion of the Candrikā (i. e. Smṛti-candrikā) is that even a brāhmaṇa felon coming to kill a man is by all means to be slain, that a brāhmaṇa who steals one's field, wife or the like (and is therefore a felon) is not to be killed, that a kṣatriya and the rest in similar circumstances (i. e. stealing a field or a wife) are to be killed. And this conclusion (of the Candrikā) is proper,[5] since the texts of Manu, Kātyāyana, Gālava and Bṛhaspati referring as they

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1. These two verses very much exercised the minds of ancient writers. Manu XI. 89 lays down that there is no expiation if one intentionally kills a brāhmaṇa and in Manu IV. 162 there is an injunction not to kill one's *guru*, parents, brāhmaṇas and cows. Therefore Manu VIII. 350 if literally taken as a *vidhi* would conflict with Manu IV. 162 and XI. 89. But really Manu VIII. 350 is an *arthavāda*. In Manu VIII. 348-349 it is said that anyone of the first three classes may take up arms when there is hindrance to dharma or in self-defence or for protecting women and brāhmaṇas and that if he kills anyone while doing this there is no sin incurred. Then 350 says that one may kill an ātatāyin whether he be a guru etc. So these words do not contain a *vidhi* saying that *guru* must be killed when he is an ātatāyin. These words only convey that even a *guru* may have to be killed, what of others? Such particles as 'vai' (in the Vedas) or vā are indicative of an *arthavāda* (a laudatory or condemnatory text). Vide Jaimini I. 2. 7 and 26-27. Vide notes to V. M. pp. 416-419 for detailed explanation.

2. 'Kaimutika' is derived from the words 'kim-uta'; *kaimutika nyāya* is a maxim used where a conclusion will *a fortiori* follow as regards certain matters when it is conceded that it does follow in certain other *less* important or less obvious matters.

3. The conclusion of the Mit. is stated on Yāj. II. 21.

4. 'Bhrūṇa' ordinarily means 'a child in the womb', but 'bhrūṇa' in Gālava is explained by Sm. C. as brāhmaṇa and by the Vir. 'an excellent brāhmaṇa.' According to the Baudhāyana Gṛhya a 'a bhrūṇ'a is one who knows the whole Vedic lore of his s'ākhā up to sūtra and pravacana.

5. Vide notes to V. M. pp. 419-420 for the views of the Smṛti-candrikā. Nīlakaṇṭha approves of the three propositions of the Candrikā, but as will be seen a little lower down he adds a qualification to the first proposition of the Candrikā viz. that though an ātatāyi brāhmaṇa may be killed, that holds good as regards past ages, but in the present Kali age an ātatāyi brāhmaṇa cannot be killed even in self-defence. In his Nītí-mayūkha Nīlakaṇṭha approves of the three propositions of the Candrikā without qualification.

* P. 242 (text).

do to a particular felon viz. one who is intent upon a killing a person, it is right to hold that they are (in the nature of) exceptions to the previously cited texts of Sumantu and Kātyāyana that are in the nature of a general proposition (about felons).[1] As for the text of Bṛhaspati

he, who will not kill a felon of the highest class that is endowed with the best religious conduct and Vedic study, though he deserves death, shall acquire the merit (of the performance) of a horse sacrifice,

that too has reference to a felon other than one intent upon killing that man. Moreover by the text 'excellent brāhmaṇas even though felons should not be killed (even) in a fight that is just (or approved by the s'āstras)' the slaying of a brāhmaṇa felon intent upon killing another is forbidden. This prohibition (about killing an ātatāyi brāhmaṇa) in the Kali age would be unmeaning if it (killing an ātatāyi brāhmaṇa) were not enjoined as an act to be done.[2] For all digests (on dharmas'āstra) establish that the prohibition of certain acts in the Kali age fell within the purview of enjoined acts (as regards former ages) on account of the proper significance of the word ***dharma*** occurring in the text 'the wise declare that these ***dharmas*** (enjoined acts) are to be avoided in the Kali age.' Therefore in the Kali age a felonious brāhmaṇa even though intent upon killing a person should not be killed (even in self-defence by that man); but in other ages he was certainly (allowed) to be *killed; however a felonious brāhmaṇa different from the preceding (i. e. one not coming to kill) was not to de killed (i. e. killing him was forbidden) in all ages, while all felons whatever of the kṣatriya and other classes are liable to be killed in all ages. This is a bare outline (of the subject).

Bṛhaspati (p. 363 vv. 25-28) declares the punishments for seizing articles of the lowest, middling or best kinds :

One who destroys or steals implements of husbandry, flowers, roots and fruits shall be fined a hundred or more (up to two hundred) according (to the nature of the property). One who destroys or steals cattle, clothes, food, drink, household utensils should be punished with a fine of two hundred or more. In the case of women, men, cows, gold, precious stones, the property of a deity or of a brāhmaṇa or of women and in the case of other precious things the fine shall be equal to the value (of the thing stolen).

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1. The texts of Sumantu and Kātyāyana in general terms say that an ātatāyi brāhmaṇa should not be killed; the four texts of Manu and the other sages particularly refer to a brāhmaṇa approaching for killing; therefore they restrict or modify the general rule. The maxim is 'sāmānyaṁ vis'eṣeṇa bādhyate' (a general proposition is modified or restricted by a particular one).

2. A niṣedha only prohibits what would otherwise follow as a matter of course. Vide p. 231 *n* 3 above. Since *ātatāyibrāhmaṇa-vadha* is forbidden in *kali* along with several other matters, all of which are spoken of as *dharmas* proper in former ages, it follows that such a vadha was a *dharma* in former ages.

* P. 248 (text).

Or double (the price) shall be inflicted by the king having regard to the offender; or the thief shall be executed to prevent a repetition (of the offence).

'Yauṣeyam' means 'strīdhana': the word 'vā' (in the last half) is used in the sense of 'eva' (certainly). Madana says that these texts refer to the subject of *sāhasa* (and not to steya) on account of the proper significance of the words 'vināśayan' (destroying), 'hartā' (a robber).

Yājñavalkya (II. 231) states the punishment for him who incites a man to a *sāhasa*:

He who causes the commission of a sāhasa should be made to pay a fine double (of what the offender himself has to pay). He, who causes another (to commit *sāhasa*) by saying thus 'I shall pay', shall be made to pay a fine four times as much.[1]

'Dvaiguṇyam' and 'cāturguṇyam' mean double or quadruple of what is imposed as a fine on the actual offender. Manu (VIII. 378) lays down the fine for him who by force enjoys a virtuous brāhmaṇa woman:

*A brāhmaṇa enjoying a guarded brāhmaṇa woman against her will shall be fined a thousand paṇas.[2]

But if the crime be committed by a kṣatriya or the like againt such a brāhmaṇa woman, Bṛhaspati (p. 366 v. 10) says:

(The king) shall confiscate the whole of the wealth of him who forcibly violates another's wife and having caused his penis and scrotum to be cut off he shall cause him to be paraded (in the streets) on an ass.

'Kāmayet' (in Bṛhaspati) means 'enjoys another's wife.' As regards rape of a woman of the same caste by a man of the kṣatriya or other caste or by persons who are offsprings of an *anuloma* marriage or offsprings of a pratiloma marriage Kātyāyana declares the punishment:

When a man has forcibly enjoyed a woman, (the king) should inflict death on him, since that act is (a grave) transgression of proper conduct.

The same author (Kātyāyana) says:

When a woman has been enjoyed against her will she shall be kept in the house well guarded, her body being in a slovenly (or dirty) state, she should sleep on the ground and should receive bare maintenance (to keep body and soul together)[3].

The same auther (Kātyāyana) says:

She who has been enjoyed by a man of a lower class is to be abandoned or may suffer death.

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1. 'I shall pay'—this means either a reward to the offender or that he would pay the fine imposed on the wrongdoer.

2. 'Guarded' means either by her husband or by her own vows of chastity &c.

3. This is Bṛ. p. 367 v. 13.

* P. 244 (text).

'Vadha' it should be understood, was to be effected if she was a consenting party.[1] Nārada (p. 203 vv. 7-8) states the punishment for sāhasa of the lowest, middling and highest degrees :

> The punishment for a sāhasa of the lowest degree must be a hundred paṇas at the least in proportion to the act (i.e. the gravity of the offence), while for a sāhasa of the middling degree the fine prescribed by those conversant with the s'āstras is five hundred at least. For* sāhasa of the highest degree a fine of not less than a thousand is ordained. (Besides) death, confiscation of all property, banishment from the town, branding and amputation of that limb (with which the crime was committed)—these are declared to be the punishment for sāhasa of the highest degree.

The direction (in the smṛtis) to inflict death, mutilation and the like is addressed to the king and to none else, since he alone has the authority (or right) to inflict punishment.

Thus ends (the section on) sāhasa.

Now begins (the section on) adultery.[2]

Forcibly enjoying another's wife being a *sāhasa*, the punishment for it has already been stated. But as regards the enjoyment of another's wife of the same caste by fraud Bṛhaspati (p. 366 v. 11) says :

> When a man enjoys a woman by fraud his punishment will be the confiscation of his entire wealth and he shall then be branded with the mark of the female private parts and be banished from the town.

'Sarvaharaḥ' means 'that which takes away the entire property.' This punishment applies in the case of a woman of the same caste; in the case of a woman of a lower caste, (the punishment is) half of this ; in the case of a woman of a higher class (than the adulterer), it is death. And similarly the same author (Bṛhaspati p. 366 v. 12) says :

> Half of that punishment that is prescribed for (adultery) in the case of a woman of the same caste is imposed, when the woman is of a lower caste : but for connection with a woman of a higher caste, the punishment for the male is death.[3]

1. If she consented to her being enjoyed by a man of low caste. It is also possible to take it in the sense 'if she consented to submit to death.'

2. Vide *Rahi* v. *Govind* 1 Bom. 97 at p. 116 where it is said after referring to the Mayūkha that adultery was regarded and punished as a crime of a grave character.

3. This verse prescribes punishment for the male, but says nothing about the woman.

* P. 245 (text)

The same author (Bṛhaspati p. 366 v. 9) prescribes the punishment for the three kinds of adultery viz. lowest, middling and highest:

For these three (gradations of adultery) the first, middling and highest fines shall be inflicted respectively; even higher fine may be awarded if (enjoyment is had) forcibly in a lonely place.[1]

*Manu (VIII. 354) lays down the punishment for a vicious man having a talk with the wife of another man:

If a man engages himself in a conversation with the wife of another, when he had already been accused of (similar) offences (with regard to her), he shall undergo the first amercement.[2]

In regard to conversation between a man and woman who have been both forbidden (to talk) by their parents and the like, Yājñavalkya (II. 285) says:

A woman (*talking*) after being forbidden should be fined a hundred *paṇas* while the man should be fined two hundred; when there is prohibition (addressed) to both, the punishment for both is the same as in adultery.

The first half of the verse refers to prohibition (addressed) to each separately; while the latter half to prohibition addressed to both. Yājñavalkya (II. 286) states the punishment for intercourse brought about by mutual desire:

When (the adultery is) between members of the same caste, the highest amercement is the penalty; for an ***anuloma*** intercourse (adultery with a woman of a lower caste) the middling amercement (is the penalty); but for ***pratiloma*** intercourse (adultery with a woman of a higher caste) death (is the penalty) for the male and the lopping off of the ears and other limbs in the case of the woman.[3]

Kātyāyana says:

In the case of all offences women should pay half of the monetary punishment which is prescribed for a male; when (the punishment) for the male is death, (the punishment for women) would be cutting off a limb.

With regard to intercourse with a brāhmaṇa woman leading a loose life Manu (VIII . 378) says:

He would be liable to a fine of five hundred for intercourse with a consenting woman.

1. The threefold grades of adultery are made as regards 'anurāgaja' (vide Bṛ. p 365 vv. 2, 5-8). Therefore the fourth quarter as read in the text is irrelevant and the reading 'draviṇādhike' of Aparārka and others is better. It means 'higher fine may be inflicted on a rich man.'

2. But there was no objection to talk with another's wife for a reasonable cause and if there had been no previous charge. Vide Manu VIII. 355.

3. The Mit. construes this verse differently. Vide notes to V. M. pp. 426-427.

* P. 246 (text).

*This refers to a woman of the same caste. The same author (Manu VIII. 385) says as regards *anuloma* intercourse with women of loose character :

A brāhmaṇa having intercourse with a kṣatriya or vais'ya woman who is unguarded or with a s'ūdra woman should be fined five hundred paṇas and a thousand *paṇas* if he has intercourse with a woman of the *antyaja* class.[1]

As to the text of Manu (VIII. 383) 'a brāhmaṇa should be made to pay a fine of a hundred paṇas, if he has intercource with guarded women of the two classes (kṣatriya or vais'ya),' it refers to a chaste woman. Manu (VIII. 374) declares the punishment of a s'ūdra for intercourse with a woman of a higher caste:

A s'ūdra having intercourse with a woman of the twice-born classes whether guarded or not shall lose the (offending) limb and his whole estate when the woman is unguarded and loses everything (including life) if the woman is guarded.

The meaning is: a s'ūdra having intercourse with an unguarded woman of the twice-born class is liable to have his penis cut off and all his property confiscated, but if he has intercourse with a guarded woman he incurs the confiscation of all his property and death. Gautama (XII. 2-3) says: 'for adultery with the wife of the preceptor, the man's penis will be cut off and his whole property will be confiscated; and if the woman be guarded, there is the additional (penalty of) death.' Manu (VIII. 376) says:

'When a kṣatriya and vais'ya have sexual intercourse with a brāhmaṇa woman, who is unguarded, the vais'ya shall be fined five hundred, but the kṣatriya one thousand.[2]

The same author (VIII. 377) says:

†Both of them (kṣatriya and vais'ya) however, if they commit adultery with a guarded brāhmaṇa woman, should be punished like a s'ūdra[3] or be burnt in a fire of dry grass.

The same author (Manu VIII. 382) says:

If a vais'ya has intercourse with a guarded woman of the kṣatriya class or a kṣatriya has intercourse with a vais'ya woman (who is guarded), both of them deserve the same punishment that is awarded (for intercourse) with an unguarded brāhmaṇa woman.

The meaning is that the fine is what is inflicted for intercourse with an unguarded brāhmaṇa woman. Vasiṣṭha (21. 3--5) says: 'if a kṣatriya has intercourse with a brāhmaṇa woman, (the king) shall throw him into fire after'

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1. Antyaja woman would be a woman of the untouchable classes such as leather workers, cāṇḍālas &c. Vide notes to V. M. p. 27.

2. Read 'yadāguptām' (yadā + aguptām) in the text.

3. i. e. with the loss of the penis, all property and life,

* P. 247 (text). † P. 248 (text).

having tied him up in leaves of s'ara grass; the same (punishment should be awarded) if a vais'ya has intercourse with a kṣatriya woman and a s'ūdra, with kṣatriya or vais'ya woman.' Nārada (p. 179-180 vv. 73-75) says:

The mother, the mother's sister, mother-in-law, maternal uncle's wife, father's sister, the wife of a paternal uncle, of a friend and of a pupil, the sister, sister's friend, daughter-in-law, daughter, the wife of a preceptor, a woman of the same *gotra*, a woman who has come for an asylum or refuge, a queen, a female ascetic, a nurse, any chaste woman and a female of the highest caste—when a man has intercourse with any one of these women he is said to have violated the preceptor's bed; for such a crime no punishment other than excision of the penis is ordained (in the smṛtis).[1]

Yājñavalkya (III. 232-233) also says:

One who has intercourse with his father's or mother's sister, maternal uncle's wife or his own daughter-in-law, or with his step-mother or sister or his preceptor's wife, or daughter, with his own daughter, becomes a violater of the preceptor's bed. His penis should be cut off and he should be put to death and the woman also (should be put to death) if she was full of lust (i. e. a consenting party).

*This punishment is not to be inflicted on a brāhmaṇa, since Bṛhaspati in his section on brāhmaṇas says:

The king should brand with painful punishments a brāhmaṇa who has started on the path of having intercourse with another's wife and should banish him. One, not a brāhmaṇa, deserves for adultery any punishment up to death.

S'aṅkha-Likhita say 'with whatever member of the body an offender commits an offence, that very member of his should be cut off except in the case of a brāhmaṇa.' Yājñavalkya (II. 290) declares the punishment for a brāhmaṇa when he has intercourse with a female slave and the like:

A man having intercourse with *avaruddhā* slaves and bhujiṣyās shall be made to pay a fine of fifty paṇas even when intercourse with them may be unobjectionable (on the ground of caste &c.).[2]

'Avaruddhāḥ' are those that are forbidden by their master to have intercourse with other men. Nārada (pp. 180-81 vv. 78-79) says:

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1. The V. R. says that mother means 'step-mother' here. It is to be noted that intercourse with a female ascetic is put by Nārada on a par with incest. Manu VIII. 363 treats it on a level with intercourse with wives of actors and singers and punishes it lightly. Vide also Yāj. II. 293 quoted at the end of the section on 'adultery'.

2. The text of Yāj. and the Mayukha thereon are quoted in 48 Cal. 643 F. B. at p. 694 and in *Yeshwantrao* v. *Kashibai* 12 Bom. 25 at p. 28 n 5. Vide also *Mathura* v. *Esu* 4 Bom. 545 at pp. 549-50. According to the Mit. an *avaruddhā* is one who is ordered by her master to stay at home for service and who is forbidden to have intercourse with other males; while a bhujiṣyā is a concubine kept by the master himself. Vide *Bai Nagubai* v. *Bai Monghibai* L. R. 53 I. A. 153 = 50 Bom. 604 at p. 612 for the meaning of 'avaruddhā.'

* P. 249 (text).

Intercourse is permitted with a wanton woman who belongs to another than the brāhmaṇa caste, or with a prostitute, a female slave or a female who has left her family, if these belong to a lower caste; but intercourse is not permitted with (such) women if they belong to a higher caste. When, however, such women are kept mistresses (of another man) intercourse with them is as culpable as with another's wife.[1]

The word 'abrāhmaṇī' is an attribute of the word 'svairiṇī'; svairiṇī means 'one who is independent and has free intercourse with men'; 'niṣkāsinī' is 'a woman who has left her family and has free intercourse with men.' Yājñavalkya (II. 294) says:

If a man has connection with an *antya* (untouchable) woman he should be branded with an obscene mark and banished; similarly a s'ūdra is liable to be branded only if he does the same; but if an *antya* (untouchable) have intercourse with an *āryā* woman death (is the penalty).[2]

*When the sexual intercourse is wilfully brought about by a woman (she being the aggressor) Nārada[3] states the punishment for her;

When a woman comes to a man's house and has intercourse with him after exciting his passion by touching him and the like acts, she should be punished[4] and half of her punishment should be inflicted on the man.

Yama prescribes the punishment for women of the brāhmaṇa and other castes for intercourse with s'ūdra males or the like:

The king should have that woman devoured by dogs at the place of the executioners (caṇḍālas), who, being overpowered by passion, seeks a s'ūdra (for intercourse).[5] That brāhmaṇa woman who resorts to a vais'ya or kṣatriya (for intercourse) would have her head shaved and shall be marched on an ass (through the streets).

'Vṛṣala' means 'a s'ūdra'; 'vadhyaghātinaḥ' means 'executioners'; the meaning is 'at the place where executioners live'. In the Candrikā (Smṛti-candrikā) it is said that this fine is inflicted for excessive attachment (to the paramour). Yājñavalkya (II. 283) declares the means of determining (the fact of) adultery:

A man is to be held (caught) as guilty of adultery by the fact of his caressing the hair of another's wife or by fresh signs of lust or by the confession of both.

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1. 'Niṣkāsinī' is explained as 'a female slave not restrained by her master' by Mādhavācārya and others. The Mayūkha follows the Madanaratna.

2. 'Āryā' woman means 'a woman belonging to the three higher castes.' Āp. Dh. S. II. 2. 3. 1 and 4 distinguishes between Ārya and S'ūdra. The Mit. and Vīr. read 'antya eva' which means that the s'ūdra would himself become an antyaja. The force of 'eva' is this that he is not liable to be punished.

3. This is Bṛ. p. 367 v. 15.

4. Her punishment would be the same as is prescribed for a male who makes the first overtures.

5. Compare Gautama XXIII. 14 and Manu VIII. 371.

* P. 250 (text)

From the expression 'dvayoḥ' (occurring in Yāj.) it follows that even if one of the two admits adultery there is no certainty. As regards slander Yājñavalkya (II. 289) says:

For uttering a (true) slander about a woman a man should be fined a hundred paṇas and two hundred if he makes a false accusation.[1] For intercourse with beasts he should be made to pay one hundred and one who has intercourse with a distressed woman (even if she be one's own wife) or a cow should be fined the middling amercement.

Also (Yāj. II. 293)

If a man has intercourse with a woman in an improper part and if one voids excrement before a male the fine* is twenty-four paṇas and the same (is the fine) for intercourse with a female ascetic.[2]

'Dīnām' means 'distressed woman, even one's own wife.' The meaning is 'one who voids excrement and the like before a woman.'

Thus ends (the section) on adultery.

Now begins (the section) on duties of husband and wife.

Punishment for the husband's abandoning a wife possessed of good qualities is thus declared:[3]

If a man leaves a wife who is obedient, not sharp-tongued, skilful, possessed of virtues and solely devoted to her husband, the king should place him (on the right track) by means of punishment.

Yājñavalkya (I. 76) says:

He who deserts a wife that carries out his commands, who is diligent, mother of an excellent son and speaks pleasantly shall be compelled to pay the third part (of his wealth to her); or if he has no wealth he shall be compelled to provide maintenance for her.[4]

The same author (Yāj. I 77) says with regard to women:

Wives should do the bidding of their husbands. This is the highest

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1. Both the Mit. and Aparārka take 'strī' as meaning maiden here. Nārada (p. 172. v. 36) ennumerates the doṣas of maidens as 'affliction with a chronic or disgusting disease, deformity, loss of virginity by sexual intercourse, being wicked, having the heart fixed on some one else.'

2. Nīlakaṇṭha seems to have read 'purīṣam.' But Mit., Aparārka, Par. M. and Vir. read as in the text.

3. This is Nārada p. 184 v. 95.

4. This is quoted in *Savitribai* v. *Laxmibai* 2 Bom. 573 at p. 598 as a mandatory text requiring the husband to maintain his wife irrespective of the possession of property.

* P. 251 (text).

duty of a wife. Even if the husband be tainted with a deadly sin she should wait for him till he is purified (by expiations).

Thus ends the section on duties of husband and wife.

*Now begins the (section on) gambling and prize-fighting.[1]

Yājñavalkya (II. 201) says :

> The king should enforce payment of the stake property won in a public assembly of bettors presided over by a master (of the gaming house), when the king's share (in the stake won) has been paid up (by the master) and not otherwise (when carried on secretly and without sabhika).

'Prasiddhe' means 'not in secret'; 'dhūrtamaṇḍale' means 'in gaming house'; 'sabhikaḥ' is the superintendent of gambling appointed by the king. The meaning is : the king should enforce payment of what is won in this manner (indicated in the verse) and nothing else. The same author (Yaj. II. 202) lays down the punishment for him who is guilty of fraud in gambling :

> Men who play with false dice and by tricks should be branded by the king and banished.[2]

'Upadhiḥ' means 'a trick or fraud.' Manu (IX. 224) declares the punishment if gambling be carried on without the king's permission :

> The king should punish corporally all those who themselves engage in gambling and prize-fighting or cause (incite) others to do so and also śūdras who wear the marks of the twice-born.[3]

'Dvijaliṅgam' (marks of the twice-born) means 'the sacred thread, uttering the Veda and the like.' Yājñavalkya (II. 203) extends the rules about gambling to *samāhvaya* (prize-fighting) :

> This very law should be understood to apply to prize-fighting in which there is gambling with animate objects.

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1. The difference between *dyūta* (gambling) and *samāhvaya* is that the former is carried on with inanimate objects (like dice) and the latter with animate objects (such as cocks, rams, bulls, buffaloes, and wrestlers). Vide Manu IX. 223, Nārada p. 212 v. 1 and Bṛ. 385 v. 3.

2. Compare Nārada p. 213 v. 6.

3. The attitude of Manu towards gambling was rather uncompromising. But Yājñavalkya allowed gambling under the supervision of persons appointed by the king as it helped in detecting thieves. Bṛhaspati p. 385 v. 1 says that gambling was prohibited by Manu because it destroys truth, honesty and wealth, but other legislators permitted it when conducted so as to allow the king a share in the stakes.

* P. 252 (text).

'Prāṇidyūto' is an attribute of samāhvya and the meaning is 'samāhvaya which is different from it[1] (only in this that it is gambling with animate objects).'

Thus ends (the section on) gambling and prize-fighting.

***Now begins (the section on) miscellaneous matters.[2]**

Yājñavalkya (II. 295--296) says:

He who either omits or adds anything in writing to the king's edict or who allows an adulterer or thief to escape shall suffer the highest amercement. He who defiles a brāhmaṇa, kṣatriya, vais'ya, s'ūdra by feeding him with food not fit to be eaten should be punished with the highest amercement, the middle amercement, the first amercement and half of the last respectively.

'Abhakṣyam' means 'wine, urine, ordure and the like.' The same author (Yāj. II. 297) says:

He, who deals in false gold (as genuine), who sells unclean meat, should be deprived of a limb and should be made to pay the highest amercement.

'Vimāṁsam' means 'the flesh of cows and the like.'[3] In the Mitākṣarā it is said that by the use of the particle '*ca*' (and) it follows that mutilation is also meant (to be an additional) punishment. Similarly (Yāj. II. 300)

If the owner of animals with tusks or horns fails to rescue a man (attacked by such animals), though able to do so, he should be awarded the first amercement and double that amount (when he does not rescue) even though (the victim) cried aloud (for help).

'*Vikros'aḥ*' means 'crying out'. Manu (VIII. 296-298) says:

If a human being were killed (by an animal or car through the carelessness of the driver) he would at once incur the guilt of a thief; if such large animals as cows, elephants, camels, horses and the like were killed (through rash driving), half (of the highest amercement) was to be inflicted. On the death of minor animals (by rash driving) the fine is two hundred: but the fine is fifty paṇas when auspicious animals (like deer)

1. It is better to read 'tad-abhinne' for 'tad-bhinne'. 'Tad- abhinne' would mean that samāvhya is prāṇidyūta and that the rules about the former are not different from the latter.

2. Viṣṇu 42. 1 defines prakīrṇaka as what is left unsaid elsewhere. According to Nārada (p. 214 vv. 1-4) *prakīrṇaka* comprehends all those matters in which the king acts of his own motion without any complaint being lodged or a suit being filed and whatever else that may have been omitted in the preceding titles of law. Vide Bṛhaspati p. 386 v. 1.

3. Mit. explains 'vimāṁsa' as 'unclean meat mixed with dog's flesh,' while Aparārka explains it as the flesh of the village pig and the like passed off as excellent meat.

* P. 253 (text).

and birds (like pigeons and parrots) are killed. *Five māṣas is the fine for one who kills an ass, goat or sheep.[1] The fine is one māṣa for killing a dog or hog.

It is to be understood that this fine (was to be paid) after paying to the owner the price of the animal killed. Yājñavalkya (II. 301) says:

He who charges the paramour (of a woman in his family) as a thief should be made to pay a fine of five hundred and he who lets him off after taking money from him should be fined eight times that (money).[2]

'Upajivya' means 'having received.'

The king should banish, after cutting out his tongue, that man who pronounces an imprecation of misfortunes on the king or who runs down the king or who divulges the king's secret counsels (Yāj. II. 302).

'Aniṣṭam' means 'death and the like'; *ākros'aḥ* means such things as saying 'may you lose the kingdom.' Manu (IX. 275) says:

Men who rob the king of his treasure, men who obstinately oppose his commands and those who are in league with his enemies should be punished by various modes of punishment.

Yājñavalkya (II. 303) says:

The punishment for him who sells what was on a dead body, likewise for him who strikes his preceptor, and, for him who seats himself on the king's vehicle or throne is the highest amercement.

'Mṛtāṅgalagnam' means 'the clothes and the like on dead body'. The same author (Yāj. II. 304) says:

The punishment for him who puts out both eyes of a man, for him who obeys one that is hated by the king and for a s'ūdra who makes his livelihood by passing himself off as a brāhmaṇa is a fine of eight hundred.[3]

‡ The meaning is: (the fine) for one who puts out both eyes, who does an act forbidden by the king and for a s'ūdra who makes a living by the mode of life of a brāhmaṇa. In the Mitāksarā a smṛti is quoted to the effect that if a s'ūdra put on the sacred thread for securing a meal at a *s'rāddha* he should have imprinted on his body with a heated rod a line resembling (the position of) the sacred thread The same author (Yaj. II. 305-306) states the punishment for those who wrongly decide litigations:

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1. Kullūka explains that the fine was five silver māsakas (and not of gold). A silver māsa was equal to two kṛṣṇalas. Vide Manu VIII. 135.

2. Both Mit. and Aparārka explain that he who through fear of infamy to his family or in order to save from publicity the reputation of his women says of a paramour that he was a thief was to be fined.

3. 'Rājadviṣṭādes'akṛt' is explained by the Mit. as one 'who being an astrologer (and not an elderly relation or friend of the king) makes a prophecy of impending misfortune as to the king. If a s'ūdra, in order to secure a meal, wears the sacred thread and the like he was to be punished.

* P. 254 (text). ‡ P. 255 (text).

Having again investigated (i. e. reviewed) those litigations that were wrongly decided, assessors (and also judges) together with the party (declared by them to be) successful should be fined by the king twice the amount (that was) in dispute.[1] If a man who was justly defeated (in a litigation) still thinks 'I am not rightly declared to be the losing party' and again comes to court, he, when again defeated, shall be made to pay a double fine.

Here (in all verses about fines) the mention of a number without express statement of the object (to which the number refers) is to be understood as referring to *paṇas* Paṇa is a piece of copper equal to a *karṣa*, from (the verse) of the lexicon (of Amarasiṁha) 'a paṇa is the word applied to a copper piece equal to one karṣa.'[2] A karṣa is a fourth part of *pala*. And a paṇa is (in value) as defined by Bhāskarācārya[3] '20 cowries make a kākiṇı and four kākiṇıs make a paṇa.' As regards the fines designated the highest and the like, Yāj. (I. 366) says:

The highest fine is a fine of 1080 paṇas, the middling one is half of it and half of this last is declared to be the lowest.

Moreover in case it is impossible to award adequate punishment for offences already described by means of the fines of the indicated magnitude (by Yāj.) even a greater fine may be inflicted, as Āpastamba says 'they say that daṇḍa is so called because it represses; by means of it the king should repress those who are not repressed.'[4] So also Nārada (p. 215 vv. 10--11) states a special rule when the punishment is confiscation of all property:

* The weapons of soldiers, the beasts of burden and the like of carriers of goods, the ornaments of prostitutes, the various musical instruments of professional musicians, and whatever is a tool for anybody and by which artisans acquire their livelihood—all these a king is not entitled to to take even when he confiscates the entire property.[5]

Yājñavalkya (II. 307) states what is to be done with a fine levied unjustly:

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1. 'Vivādāt &c.' may also mean 'twice the amount of the fine that was inflicted in the litigation that was wrongly decided.'

2. This occurs in the Amarakoṣ'a 2nd kāṇḍa, vais'yavarga. Amara says that five guñjās were equal to one māṣa, 16 māṣas were equal to karṣa and four karṣas made one *pala*; two things are stated about a paṇa viz. its weight as copper and its price.

3. This is part of verse 2 in Bhāskarācārya's Līlāvatī, where a table of values is given viz. 20 cowries = a kākiṇī, 4 kākiṇīs = a paṇa, 16 paṇas = a dramma, 16 drammas = a niṣka.

4. This is really Gautama XI. 28. The derivation of daṇḍa from 'dam' is ascribed in the Nirukta to Aupamanyava (II. 2).

5. The principle underlying these verses has been accepted in modern times in the execution of decrees by attachment and sale. Vide section 60, proviso b of the Civil Procedure Code (of 1908).

* P. 256 (text).

The fine that has been obtained by a king unjustly should be offered by him to Varuṇa making it thirty times as much and should be distributed by himself among brāhmaṇas.[1]

The meaning is: let him first mentally offer thirty times as much to Varuṇa and then let him give the money to brāhmaṇas.

Thus ends (the section on) miscellaneous matters.

In the *madhyades'a* (middle regions of India) famous for meritorious actions and situated in the vicinity of the auspicious confluence of the Carmaṇvatı (Chambal) with the Yamunā, stands the famous city of Bhareha, where rules the king Bhagavantadeva who is devoted to the lotus-eyed god (Viṣṇu).

Thus ends the Vyavahāramayūkha (ray of judicial matters) in the (work)
Bhagavadbhāskara composed by bhaṭṭa Nılakaṇṭha, who was commanded by Bhagvantadeva, the lord of kings, an ornament of the
S'aṅgara race, (Nılakaṇṭha) who was the son of bhaṭṭa S'aṅkara,
the head jewel of paṇḍitas, and the leader among those
who had crossed beyond the ocean of the Mımāṁsā
system and the son of the learned bhaṭṭa
Nārāyaṇa styled *jagad-guru*.

1. Manu (IX. 244-245) gives the reason of this procedure. Varuṇa is the divine lord of punishment who rules over kings and a brāhmaṇa who has fully mastered the Vedas is lord of the world. Varuṇa is styled 'rājan' in the Ṛgveda and is regarded as noting the good and evil deeds of men. Vide Ṛgveda VII. 49. 3.

GENERAL INDEX

N. B. The figures refer to pages. Important Sanskrit words and the names of Sanskrit works and authors are put in italics.

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